No. 89-7370-CFY
Status: GRANTED

Title: Moshe Gozlon-Peretz, Petitioner
v.
United States

Docketed:
April 25, 1990

Court: United States Court of Appeals
for the Third Circuit

Counsel for petitioner: Goldberger,Peter

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Apr 25 1990	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	May 23 1990		Brief of respondent United States filed.
4	May 30 1990		DISTRIBUTED. June 14, 1990
6	Jun 18 1990		Petition GRANTED. limited to the following question: Whether the mandatoryminimum terms of supervised release required by the Anti-Drug Abuse Act of 1986 became effective for offenses committed on or after the date of enactment, October 27, 1986. **********
7	Jun 28 1990	G	Motion of petitioner for appointment of counsel filed.
8	Jul 2 1990		DISTRIBUTED. Sept. 24, 1990. (Motion of petitioner for appointment of counsel).
9	Jul 24 1990		Joint appendix filed.
12	Aug 2 1990		Brief of petitioner Moshe Gozlon-Peretz filed.
10	Aug 8 1990	D	Application (A90-113) by Moshe Gozlon-Peretz to file a brief on the merits in excess of page limits, submitted to Justice Stevens.
11	Aug 13 1990		Application (A90-113) denied by Justice Stevens.
13	Aug 30 1990		Record filed.
		*	USDC
14	Aug 30 1990		Record filed.
		*	9 vol., USDC.
15	Sep 13 1990		Record filed.
		*	one vol.,-USCA 3.
16	Sep 17 1990		Brief of respondent United States filed.
19	Sep 26 1990		SET FOR ARGUMENT TUESDAY, OCTOBER 30, 1990. (2ND CASE)
18	Sep 28 1990		CIRCULATED.
17	Oct 1 1990		Motion for appointment of counsel GRANTED and it is ordered that Peter Goldberger, Esquire, of Philadelphia, Pennsylvania, is appointed to serve as counsel for the petitioner in this case.
20	Oct 11 1990	G	Motion of the Solicitor General for leave to permit Amy L. Wax, Esq. to present oral argument pro hac vice filed.
21	Oct 23 1990	X	Reply brief of petitioner Moshe Gozlon-Peretz filed.
22	Oct 29 1990		Motion of the Solicitor General for leave to permit Amy L. Wax, Esq. to present oral argument pro hac vice GRANTED.
23	Oct 30 1990		ARGUED.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

89-7370

No. 89-

ORIGINAL

IN THE UNITED STATES SUPREME COURT

October Term, 1989

MOSHE GOZLON-PERETZ

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Pursuant to 28 U.S.C. § 1915, this Court's Rule 39.4, and 18 U.S.C. § 3006A(d)(6), the petitioner, Moshe Gozlon-Peretz, moves for leave to proceed in forma pauperis. In support of his motion, he states:

1. This proceeding is a petition for a writ of certiorari to review the judgments and opinions of the United States Court of Appeals for the Third Circuit, dated January 25, 1990, and January 9, 1989, affirming his convictions in the United States District Court for the District of New Jersey and remanding for imposition of terms of supervised releases as part of the judgment of sentence imposed at resentencing.

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2. The petitioner is unable to pay the fees and costs for this petition or to give security therefor.

3. By leave of court, the petitioner proceeded at resentencing and on appeal from resentencing in forma pauperis. Undersigned counsel was appointed to represent the petitioner under the Criminal Justice Act by Order of the court of appeals dated April 10, 1990, as substitute counsel.

4. There has been no substantial favorable change in the petitioner's financial condition since the time of resentencing.

WHEREFORE, petitioner prays that this Court grant his leave to proceed in this Court in forma pauperis.

Respectfully submitted,
THE PETITIONER

Dated: April 25, 1990

By: PETER GOLDBERGER
The Ben Franklin, suite 400
Chestnut Street at Ninth
Philadelphia, PA 19107
(215) 923-1300

Attorney for the Petitioner

No. 89-

IN THE UNITED STATES SUPREME COURT

October Term, 1989

MOSHE GOZLON-PERETZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETER GOLDBERGER
Counsel of Record
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Philadelphia, PA 19107

(215) 923-1300

Attorneys for Petitioner

April 1990

QUESTIONS PRESENTED

1. Is either a Special Parole Term or a term of Supervised Release a part of the sentence required to be imposed for a higher-volume federal heroin offense committed in February 1987?

2. Where the statements of an alleged coconspirator are offered in evidence against a federal criminal defendant, does Fed.R. Evid. 801(d)(2)(E) require a preliminary showing that the two had agreed to a shared criminal objective or is it sufficient that the two were merely participants in some joint venture?

3. Is 18 U.S.C. § 3013, requiring imposition of a $50 Special Assessment as part of the sentence for every federal offense, invalid as a revenue raising measure enacted in contravention of the Origination Clause of the United States Constitution?

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1.

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (Moshe Gozlon-Peretz and the United States). Ellus Yehuda and Yaffa Levy were codefendants in the district court and were parties to the initial direct appeal. Neither was a party to the appeal after resentencing on remand, and neither is a party to this petition.

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TABLE OF AUTHORITIES

CASES

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOSHE GOZLON-PERETZ respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered on January 25, 1990, requiring the imposition on him of a term of supervised release in this pre-Sentencing Reform Act case, and also (as to one issue) the judgment and opinion of the Court of Appeals entered on January 9, 1989, affirming his convictions in the District of New Jersey for controlled substance offenses.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit on appeal after remand, as to the sentencing issue, filed on January 25, 1990, is published as United States v. Gozlon-Peretz, 894 F.2d 1402 (3d Cir. 1990). It is Appendix A to this petition. The Opinion of the United States Court of Appeals for the Third Circuit affirming the convictions on direct appeal, filed on January 9, 1989, is published sub nom. United States v. Levy, 865 F.2d 551 (1989) (en banc). Appendix B. There is no published opinion of the District Court. The Judgment and Commitment Order of the district court (Hon. John F. Gerry, Ch.U.S.D.J.), dated and filed April 14, 1989, imposing sentence after remand, is Appendix C.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit vacating the term of Special Parole and remanding for entry of a term of Supervised Release was entered on January 25, 1990. This petition is filed within 90 days of that date. Rule 13.1 (1990 rev.). The judgment of the United States Court of Appeals for the Third Circuit affirming the petitioner's convictions on direct appeal was entered January 9, 1989. As to one issue decided there, the petitioner also invokes this Court's discretion to review an issue resolved on that earlier appeal after the time set forth by Rule of Court, see Schacht v. United States, 398 U.S. 58, 63-64 (1970); see generally R.Stern, E. Gressman & S.Shapiro, Supreme Court Practice 306-10 (6th ed. 1985). It was in the interests of judicial economy and conservation of this Court's resources that the petitioner await resentencing on remand before deciding whether to petition on the merits of his convictions. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTES, RULES AND CONSTITUTIONAL PROVISION INVOLVED

Between 1970 and October 12, 1984, 21 U.S.C. § 841(b) provided the penalties for drug distribution charges, in the following terms:

> (b) Except as provided in section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:
>
> (1)(A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or both. ... Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of ... a prior conviction [for a federal drug felony], impose a special parole term of at least 3 years in addition to such term of imprisonment ....

The **Controlled Substances Penalties Amendments Act of 1984, Pub.L. 98-473, ch. V, § 502, 98 Stat. 2068**, effective October 12, 1984, provided, in pertinent part:

> Sec. 502. Subsection (b) of section 401 of the Controlled Substances Act (21 U.S.C. 841(b)) is amended --
>
> (1) in paragraph (1), by --
>
> (A) redesignating subparagraphs (A) and (B) as subparagraphs (B) and (C), respectively, and inserting after "(1)" a new subparagraph to read as follows:
>
> "(A) In the case of a violation of subsection (a) of this section involving --
>
> "(i) 100 grams or more of a controlled substance in schedule I or II which is a mixture or substance containing a detectable amount of a narcotic drug [other than cocaine and related substances] ...;
>
> "(ii) a kilogram or more of any other controlled substance in schedule I or II which is a narcotic drug [i.e., a kilo or more of cocaine];
>
> ....
>
> such person shall be sentenced to a term of imprisonment of not more than 20 years, a fine of not more than $250,000, or both. ..."

As a result of the 1984 amendments, from **October 12, 1984, until October 27, 1986, 21 U.S.C. § 841(b)(1)(A)**, provided:

> (1)(A) In the case of a violation of subsection (a) of this section involving --
>
> (i) 100 grams or more of a controlled substance in schedule I or II which is a mixture or substance

containing a detectable amount of a narcotic drug other than a narcotic drug consisting of --

(I) coca leaves;
(II) a compound, manufacture, salt, derivative, or preparation of coca leaves; or
(III) a substance chemically identical thereto;

(ii) a kilogram or more of any other controlled substance in schedule I or II which is a narcotic drug;

(iii) 500 grams or more of phencyclidine (PCP); or

(iv) 5 grams or more of lysergic acid diethylamide (LSD);

such person shall be sentenced to a term of imprisonment of not more than 20 years, a fine of not more than $250,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 40 years, a fine of not more than $500,000, or both[.]

The **Anti-Drug Abuse Act of 1986, Pub.L. 99-570, § 1002, Title I, Subtitle A (Narcotics Penalties and Enforcement Act of 1986), 100 Stat. 3207-2**, provides, in relevant part:

Section 401(b)(1) of the controlled Substances Act (21 U.S.C. 841(b)(1)) is amended --

(1) by redesignating subparagraph (C) as subparagraph (D); and

(2) by striking out subparagraphs (A) and (B) and inserting the following in lieu thereof:

"(1)(A) In the case of a violation of subsection (a) of this section involving --

"(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;
"(ii) 5 kilograms or more of [cocaine];
"(iii) 50 grams or more of [cocaine base or "crack"];
....

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life ..., a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual ..., or both. ... Any sentence under this subparagraph shall, in the absence of such prior conviction [for certain drug felonies], impose a term of supervised release of at least 5 years in addition to such term of imprisonment .... Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

"(B) In the case of a violation of subsection (a) of this section involving --

"(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin; ...

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years .... Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction [for certain drug felonies], include a term of supervised release of at least 4 years in addition to such term of imprisonment .... Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

As a result of the 1986 amendments, **between October 27, 1986, and November 1, 1987, and for some time thereafter, 21 U.S.C. § 841(b)** provided:

(b) [Subject to an irrelevant exception], any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving --

(i) [1 kilo or more of any heroin mixture];
(ii) [5 kilos or more of any cocaine mixture];
(iii) [50 grams or more of any cocaine base or "crack"];

....

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life .... Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition such such term of imprisonment ....

(B) In the case of a violation of subsection (a) involving --

(i) [100 grams or more of any heroin mixture];
(ii) [500 grams or more of any cocaine mixture];
(iii) [5 grams or more of any cocaine base or "crack"];

....

such person shall be sentence to a term of imprisonment which may not be less than 5 years and not more than 40 years .... Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment ....

The **Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, §§ 1004-1005, 100 Stat. 3207-6**, provides, in pertinent part:

Sec. 1004. Elimination of Special Parole Terms.

(a) The Controlled Substances Act and the Controlled Substances Import and Export Act are amended by striking out "special parole term" each place it appears and inserting "term of supervised release" in lieu thereof.

(b) The amendments made by this section shall take effect on the date of the taking effect of section 3583 of title 18, United States Code.

Sec. 1005. Amendment to the Comprehensive Crime Control Act of 1984.

(a) Subsection (a) of section 224 of the Comprehensive Crime Control Act of 1984 is amended --

....

(2) by striking out paragraphs (1), (2), (3), and (5) and redesignating the other paragraphs accordingly.

....

The **Comprehensive Crime Control Act of 1984, ch. II (Sentencing Reform Act of 1984), Pub.L. 98-473, § 224, 98 Stat. 2030**, referred to in § 1005 of the 1986 Act, supra, provides, in pertinent part:

Sec. 224. The Controlled Substances Act (21 U.S.C. § 801 et seq.) is amended as follows:

(a) Section 401 (21 U.S.C. 841) is amended --

(1) in subsection (b)(1)(A), by deleting the last sentence;

....

In pertinent part, **18 U.S.C. § 3013 (Special assessment on convicted persons)** provides:

(a) The court shall assess on any person convicted of an offense against the United States --

(1) in the case of a misdemeanor --

(A) the amount of $25 if the defendant is an individual; and ...

(2) in the case of a felony --

(A) the amount of $50 if the defendant is an individual ....

(b) Such amount so assessed shall be collected in the manner that fines are collected in criminal cases.

As currently in effect, **42 U.S.C. § 10601** provides in relevant part:

(a) Establishment. There is created in the Treasury a separate account to be known as the Crime Victims Fund (hereinafter in the chapter referred to as the "Fund").

(b) Fines deposited in Fund; penalties; forfeited appearance bonds. ... there shall be deposited in the Fund --

(1) all fines that are collected from persons convicted of offenses against the United States ....

(2) penalty assessments collected under section 3013 of title 18 of the United States Code;

....

(c) Excess over $110 million; deposited in general fund of the Treasury; time limitation on deposit. (1) If the total deposited in the Fund during a particular fiscal year reaches the sum of $110 million, the excess over that sum shall be deposited in the general fund of the Treasury and shall not be a part of the Fund.

....

Federal Rule of Evidence 801(d)(2) provides, in pertinent part:

A statement is not hearsay if -- ... (2) **Admission of party opponent.** The statement is offered against a party and is ... (D) a statement by the party's agent ... concerning a matter within the scope of the agency ..., made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Article I, Section 7, Clause 1 of the United States Constitution provides that "All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills."

STATEMENT OF THE CASE

This petition arises from a case involving an alleged conspiracy to distribute heroin in New Jersey in February of 1987. The trial was held in May of 1987.

a. Procedural History

After a jury trial in the United States District Court for the District of New Jersey (the Hon. John F. Gerry, Chief U.S.

D.J., presiding), petitioner Moshe Gozlon-Peretz and his co-defendant Yaffa Levy were convicted on May 21, 1987, of all three Counts in an indictment charging conspiracy, possession (or aiding and abetting possession) with intent to distribute two kilograms of heroin on February 26, 1987, and aiding and abetting distribution of a separate 240 grams of heroin on that date, in violation of 21 U.S.C. §§ 841(a)(1), 846.[2]

The original sentencing hearings were held (for all three codefendants) on August 14, 1987. Regarding the petitioner, Chief Judge Gerry imposed sentence on Count 3 of 20 years' imprisonment, a Special Parole Term of five years, a committed fine of $200,000, and a $50 Special Assessment. The court imposed concurrent 20 year terms on Counts 1 and 2, a concurrent Special Parole Term on Count 2, and additional Special Assessments.

Petitioner Gozlon and codefendant Levy appealed their convictions and sentences, and codefendant Yehuda appealed the sentence imposed upon his plea of guilty. By Opinion filed January 9, 1989, after hearing reargument, the court of appeals (per Stapleton, J.) affirmed petitioner's and Levy's convictions (and Levy's sentences). United States v. Levy, 865 F.2d 551 (3d Cir. 1989) (en banc); App. B. However, the appellate court vacated petitioner's and Yehuda's sentences and remanded for

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2. The other co-defendant, Ellus Yehuda, pleaded guilty on the day of trial to Count 3 of the indictment. His sentence was vacated on direct appeal for the same reason as was this petitioner's. On remand, however, the district court permitted Yehuda to withdraw his guilty plea. He was convicted in the ensuing separate trial.

resentencing for the reason that the district court had imposed 20 year terms against both defendants on Count 3 apparently believing, on the basis of a statement of the prosecutor, that the terms carried parole eligibility after 10 years. Id. at 559-61.[3]

In connection with petitioner's resentencing on remand, counsel argued that the court should not impose Special Parole Terms on the two substantive counts of which petitioner was convicted, because the Special Parole provisions of 21 U.S.C. § 841(b)(1)(A) were repealed by Chapter V of the Comprehensive Crime Control Act of 1984 (effective Oct. 12, 1984). Referencing United States v. Munoz-Flores, 863 F.2d 654 (9th Cir. 1988) (cert. later granted), counsel further argued that the court should not impose special assessments on any of the counts, because the statutory provision authorizing such assessments, 18 U.S.C. § 3013(a)(2)(A), is unconstitutional under the Origination Clause.

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3. As amended in 1986, 21 U.S.C. § 841(b)(1)(A)(i) set a mandatory minimum sentence of ten years in prison for Count 3 in this case (and a maximum of life), because that count involved possession of at least one kilogram of heroin with intent to distribute. Section 841(b)(1)(B)(i) required a mandatory minimum of five years on Count 2, because it involved distribution of less than a kilogram but at least 100 grams of heroin; on each of these counts, probation and suspension of sentence are forbidden. In addition, parole is not allowed at any time on those two of the three counts on which Mr. Gozlon was convicted. Id. At the time of the offenses in this case, the drug conspiracy statute, 21 U.S.C. § 846, did not incorporate the mandatory minimums or nonparolability provisions of the substantive charges. (This discrepancy was eliminated as of November 18, 1988. Pub.L. 100-690, Title VI, § 6470(a), 102 Stat. 4377.)

Resentencing before Chief Judge Gerry was held on April 14, 1989. The court imposed a special assessment of $50 on each count, and Special Parole Terms of five years each on the two substantive counts, noting that he was aware of defense counsel's arguments, but not otherwise addressing them. The court imposed 15 years' imprisonment on the parole-ineligible Counts 2 and 3 for possession and distribution, and 20 years (parolable) for conspiracy on Count 1, all concurrent, as well as a (noncommitted) fine of $200,000 on Count 3. Id.

Petitioner appealed to the U.S. Court of Appeals for the Third Circuit. That court (per Becker, J., with Cowen & Seitz, JJ.) summarily rejected the challenge to the Special Assessments on the basis of it own prior decision in United States v. Simpson, 885 F.2d 36 (3d Cir. 1989). It gave plenary consideration to the challenge to the Special Parole Terms, however. The panel held that the lower court had erred in imposing Special Parole Terms, but ruled that a remand for the imposition of terms of Supervised Release was required, noting that in this regard its judgment accorded with that of the Ninth Circuit but diverged from that of the Fourth, Fifth and Eleventh. United States v. Gozlon-Peretz, 894 F.2d 1402, 1404 (3d Cir. 1990); App. A. The court further suggested that "the Supreme Court might wish to consider resolving the circuit conflict." Id. at 1406.

The jurisdiction of the court below rested upon 28 U.S.C. § 1291 and was timely invoked by Notice of Appeal filed within ten days of the entry of the initial judgment of sentence, in one

case, and within ten days of the imposition of sentence on remand for resentencing, in the other. Fed.R.App.P. 4(b). The district court's jurisdiction was properly invoked in this case under 18 U.S.C. § 3231, in that the indictment alleged the commission of federal criminal offenses.

b. Statement of Facts

The underlying facts developed at petitioner's trial are set forth in unusual detail in the Third Circuit's in banc Opinion on the direct appeal. Appendix B, 865 F.2d at 553-56. These facts show that the case against petitioner Gozlon depended entirely upon the jury's acceptance for their truth of statements attributed to his severed co-defendant, Ellus Yehuda, who did not testify at trial. For present purposes, the facts may be summarized as follows.

After several months of abortive discussions, Yehuda called a DEA agent, acting undercover, to arrange a sale and delivery of heroin. They met in Newark, New Jersey, where Yehuda said he had "a friend" who had entered the United States from Thailand with about five kilograms of heroin; he provided the agent with a small sample and quoted an approximate price. Yehuda then used a pay phone to call a beeper number and soon received a call back, during which he conversed in a foreign language that the agent could hear but could not understand. That beeper was later found in petitioner and codefendant Levy's hotel room upon their arrest, and it was ascertained that the return call to the pay phone was made from a hotel room they were then sharing in New York.

Upon completing the conversation, Yehuda told the agent the terms to which his "friend" would agree. They arranged for a kilogram sale to take place in Atlantic City.

The next day, petitioner, Levy and Yehuda travelled together by bus from New York to Atlantic City. Levy took a tenth floor room at the Sands Hotel, using the false name on her Israeli passport. Ten minutes later, Yehuda met the agent at the Golden Nugget, a different hotel, where the agent had a room. Yehuda borrowed the agent's electronic scale and returned to the Sands to obtain the first half of the delivery, taking a taxi by a circuitous route. He employed further evasive techniques before taking an elevator to either the fifth or tenth floor. Yehuda returned to the Golden Nugget after an hour and a half, still carrying the scale in a bag, and said his "friend" insisted on Yehuda's seeing the money first, which had not been part of the agreement. He described himself as "caught in the middle." The agent refused to "front" any money, but suggested Yehuda call his "friend" to try to work something out.

Yehuda used a pay phone in the hotel lobby, speaking again in a foreign language the agent did not understand. Yehuda then reported that he might be able to bring 100 grams, at which point the agent would show the money. The agent agreed, but Yehuda then said he had to await another call, as he had not spoken directly to the "friend" but rather to his girlfriend. A call soon came in to the pay phone, and Yehuda again spoke for a few minutes in a foreign language. He told the agent his friend insisted on Yehuda's seeing the money first. The agent made a

counter-offer and asked Yehuda to call his friend again, which Yehuda did, still without reaching an agreement. Investigation showed that each of these calls was to or from the room Levy had taken.

An hour later, near 11 p.m., Yehuda rented a room on the fourteenth floor of the Sands. A few minutes later, the agent received a beeper message to call a number which turned out to be a pay phone in the Sands lobby. He called and spoke with Yehuda, who said his "friend" had relented; they agreed on an initial delivery of 250 grams. At 11:45, Yehuda made the initial delivery and was arrested. Agents then searched the two rooms. Petitioner was arrested in Levy's room, along with his false passport, beeper, bus ticket stub and New York hotel receipt. Upon arrest, petitioner identified himself as shown in the passport. Over two kilograms of heroin were found in Yehuda's room, along with the bag he had been carrying.

REASONS FOR GRANTING THE WRIT

1. The decision below perpetuates a circuit conflict on the question whether supervised release can be imposed for controlled substance offenses committed between October 27, 1986, and November 1, 1987.

At petitioner Moshe Gozlon-Peretz's resentencing on April 14, 1989, the district court imposed Special Parole Terms of five years on Counts 2 and 3 of the indictment, the two substantive counts. The court of appeals ruled that supervised release was required instead. The question of which, if either, form of post-confinement monitoring is applicable to various levels of

federal drug offenses committed during various time periods has vexed the lower federal courts during the past four years.

The Count 2 conviction in this case was for distributing 240 grams of heroin, and the conviction on Count 3 was for possessing with intent to distribute in excess of one kilogram of heroin, both in violation of 21 U.S.C. § 841(a)(1). The date of the offenses was February 26, 1987. Because the provision authorizing Special Parole Terms for those offenses had been repealed before that date, the court of appeals agreed with the petitioner that the Special Parole Terms imposed by the district court are invalid and must be vacated. The court of appeals ruled, however, based on the language of § 841(b)(1) as amended in 1986, that terms of supervised release were required on those counts and remanded for their imposition. This Court should grant certiorari to review that judgment, which accords with the view of two other circuits but conflicts with the approach of six others.

The Third Circuit's decision below, reading the 1986 Anti-Drug Abuse Act amendments to § 841(b) to have established immediately-effective provisions for terms of supervised release, accords with the decisions in cases under 21 U.S.C. § 841(b)(1)(A) rendered by the Ninth Circuit in United States v. Torres, 880 F.2d 113 (1989), cert. denied, 110 S.Ct. 873, 107 L.Ed.2d 956 (1990), and the First Circuit in United States v. Figueroa, 1990 WestLaw 29309 (filed March 21, 1990).[4]

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4. But see United States v. Ferryman, to be pub. at 897 F.2d 588 (1st Cir., Feb. 21, 1990) (supervised release not applicable to Sept. 1987 case involving 9 ounces [about 250 grams] of cocaine; Special Parole Term does apply because would have come

The decision below directly conflicts, however, with a decision of the Tenth Circuit which holds that the supervised release language of § 841(b)(1)(A), as amended in 1986, was not effective for offenses committed prior to November 1, 1987. See United States v. Levario, 877 F.2d 1483, 1487-89 (1989), which accords with and endorses the reasoning applied in § 841(b)-(1)(B) cases by the Second, Fourth, Fifth, Eighth and Eleventh Circuits in United States v. Mercado, 1990 WestLaw 25091 (2d Cir., filed Jan. 10, 1990, pub. March 5, 1990) (per curiam);[5] United States v. Portillo, 863 F.2d 25 (8th Cir. 1988) (per curiam); United States v. Whitehead, 849 F.2d 849, 860 (4th Cir.), cert. denied, 109 S.Ct. 154 (1988); United States v. De Los Reyes, 842 F.2d 755, 757, 758 n.3 (5th Cir. 1988) (declining to resolve precise question presented in this case);[6] and United States v. Smith, 840 F.2d 886, 889-90 (11th Cir.), cert. denied, 109 S.Ct. 154 (1988). As suggested in the opinion below, App. A., 894 F.2d at 1405-06, this Court should grant certiorari to resolve this substantial split, which creates significant and

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under 1984 version of § 841(b)(1)(B)).

5. See also Cedeno v. United States, 1990 WestLaw 44192 (filed April 13, 1990) (per curiam); cf. United States v. Ransom, 866 F.2d 574, 575, 576 (2d Cir. 1989) (per curiam) (agreeing, albeit in non-drug case, that Supervised Release cannot be imposed as part of sentence for offense committed before November 1, 1987).

6. See also United States v. Robles-Pantoja, 887 F.2d 1250, 1258-61 (5th Cir. 1989); United States v. Posner, 865 F.2d 654, 660 (5th Cir. 1989); United States v. Byrd, 837 F.2d 179, 181-82 (5th Cir. 1988).

persistent problems in the administration of federal criminal postconviction justice.

Between its enactment in 1970 and its amendment on October 12, 1984, 21 U.S.C. § 841(b)(1)(A) provided for a Special Parole Term of at least three years as part of the penalty for the class of offenses of which petitioner was convicted in Counts 2 and 3. Effective October 12, 1984, however, Congress created a new § 841(b)(1)(A) for higher volume cases like petitioner's, which, inter alia, deleted the Special Parole provision. Comprehensive Crime Control Act of 1984, Pub.L. 98-473, ch. V (Controlled Substances Penalties Amendments Act of 1984), § 502(1), 98 Stat. 2068.[7] Therefore, "after October 12, 1984, special parole terms ... were not authorized for sentences under § 841(b)(1)(A)." United States v. De Los Reyes, 842 F.2d 755, 757 (5th Cir. 1988).

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7. The Controlled Substances Penalties Amendments Act is Part A of Chapter V of the Comprehensive Crime Control Act of 1984. New § 841(b)(1)(A) provided the penalties for violations of § 841(a)(1) involving, inter alia, "100 grams or more of a controlled substance in schedule I ... which is a ... substance containing a detectable amount of [certain narcotic drugs, including heroin]." Thus, Mr. Gozlon's Count 2 and 3 offenses, both of which involved over 100 grams of a substance containing heroin, would have been subject to § 841(b)(1)(A) as amended by the 1984 Controlled Substances Penalties Amendments Act. The chapter containing the Act did not contain an express effective date provision, and therefore became effective immediately upon being signed into law, on October 12, 1984.

Chapter II of the 1984 Act, the Sentencing Reform Act, also contained an amendment deleting the Special Parole Term from § 841(b)(1). Sentencing Reform Act of 1984, Pub.L. 98-473, § 224(a), 98 Stat. 1987, 2030. This provision initially stated that it would become effective on November 1, 1986, but Congress later delayed the effective date of the entire Sentencing Reform Act until November 1, 1987. See Mistretta v. United States, 488 U.S. 361 (1989).

On October 27, 1986, Congress again amended § 841(b) by enacting revised subsections 841(b)(1)(A), 841(b)(1)(B) and 841(b)(1)(C). These amendments, in pertinent part, established mandatory minimum penalties for violation of § 841(a)(1) involving specified higher quantities of certain substances, and substantially increased the maximum penalties for such offenses, distinguishing, for purposes of the sentencing range provided, between heroin offenses involving one kilogram or more (1986 § 841(b)(1)(A)) and those involving 100 grams or more (1986 § 841(b)(1)(B)).[8] The language of these amendments also provided for terms of supervised release for offenses under both of those subsections. Anti-Drug Abuse Act of 1986, Title I, Subtitle A (Narcotics Penalties and Enforcement Act of 1986), Pub.L. 99-570, § 1002(2), 100 Stat. 3207-2 to -3. (See text of Statutes Involved, above.) It is under that revision that petitioner was sentenced, based on the February 1987 date of the offenses for which he was convicted.

The question on which the circuits are divided is whether the supervised release provisions of the 1986 Narcotics Penalties and Enforcement Act became effective on October 27, 1986, along with the rest of that revision of § 841(b)(1), or whether they did not go into effect until November 1, 1987, which is the date on which parole was abolished and terms of supervised release first became applicable to other federal

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8. The same amendment also changed the sentencing categories for cocaine cases. The analogous cut-off points for cocaine were 5 kilos or more (1986 subsection (b)(1)(A)) and 500 grams or more (1986 subsection (b)(1)(B)).

offenses. November 1, 1987, is also the effective date of 18 U.S.C. § 3583, which defines the novel sentencing concept of supervised release and provides standards for its imposition. See Pub.L. 99-570, Title I, § 1004(b) (effective date of provisions substituting supervised release for special parole).

As the court below recognized, App. A, 894 F.2d at 1403, there no longer seems to be any dispute that an offense committed on or after October 12, 1984, and punishable (in light of the particular quantity of the particular substance involved) under 21 U.S.C. § 841(b)(1)(A) is not subject to any Special Parole Term.[9] For whatever reason, the authority for imposition of such terms was deleted from the Act by virtue of the 1984 amendments, effective immediately. See also United States v. Levario, 877 F.2d 1483, 1487 & n.6 (10th Cir. 1989).[10]

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9. The government did not concede this below. Instead, it claimed that the special parole provision was reinstated into § 841(b)(1)(A) for offenses committed between October 27, 1986, and November 1, 1987, by § 1005(a)(2) of the Anti-Drug Abuse Act of 1986. Section 1005(a)(2) of the 1986 Act amended subsection (a) of section 224 of the Comprehensive Crime Control Act of 1984 by striking paragraph (1) of that subsection. See Statutes Involved. Paragraph (1) had deleted the last sentence of § 841(b)(1)(A), as it existed before 1984, which had provided for a Special Parole Term. Section 224(a), however, did not even become effective until November 1, 1987, the same effective date as provided in the superseding supervised release provisions of § 1004 of the 1986 Act. The statute by which Congress had deleted the Special Parole provision from § 841(b)(1)(A), effective October 12, 1984, was § 502(1) of chapter V of the Comprehensive Crime Control Act of 1984. Therefore, the sole effect of § 1005(a)(2), and very possibly Congress's purpose in drafting it, was to eliminate a redundancy. The court below was therefore correct not even to discuss this erroneous contention.

10. There is a considerable number of well-reasoned cases that confirm the invalidity of the Special Parole Terms imposed in this case. E.g., United States v. Ward, 696 F.Supp. 247, 248 (W.D.Tex. 1988); United States v. Sanchez, 687 F.Supp. 1254, 1257 n.7 (N.D.Ill. 1988); United States v. Phungphiphadhana, 640 F.Supp. 88 (D.Nev. 1986).

Petitioner Gozlon was sentenced pursuant to § 841(b)(1)(A) on Count 3 for possession of approximately one kilogram of heroin, and under § 841(b)(1)(B) on Count 2 for distribution of 240 grams of heroin. The date of his offenses -- February 26, 1987 -- was after the statutory language authorizing (indeed, requiring) a Special Parole Term for those offenses had been repealed (October 12, 1984)[11] and before the effective date of the supervised release provisions (November 1, 1987). Thus, the Special Parole Terms imposed by the district court in this case were properly held on appeal in this case to be without statutory authorization and invalid.

The decision of the court below ordering the replacement of the erroneously imposed Special Parole Terms with terms of supervised release is faulty on several grounds. Most important, it conflicts with this Court's decision in Bifulco v. United States, 447 U.S. 381 (1980), which demonstrates the

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11. Under the law as it existed after October 12, 1984, there was no provision for Special Parole in any heroin case involving possession or distribution of more than 100 grams. But see United States v. McDaniel, 844 F.2d 535, 536 (8th Cir. 1988) (affirming denial of Rule 35(a) motion, holding Special Parole Term properly applied since quantity of drugs was less than one kilogram and therefore subject to sentence under § 841(b)(1)(B), rather than § 841(b)(1)(A), as amended by Controlled Substances Penalties Amendments Act; overlooking fact that offense involving 100 grams or more of heroin, as opposed to cocaine, would come within "new" 841(b)(1)(A)); United States v. Santamaria, 788 F.2d 824, 829 (1st Cir. 1986) (vacating, after government's concession of its invalidity, special parole term imposed under § 841(b)(1)(A), as amended in 1984, for possessing with intent to distribute one kilogram or more of mixture containing cocaine, on appeal from denial of Fed.R.Crim.P. 35(a) motion; also ignoring that 100 grams or more of heroin would come within amended subsection (A)).

correct methodology for resolving questions of statutory interpretation regarding whether a certain form of post-release monitoring applies, but which the court below does not even cite. In Bifulco, applying the rule of lenity, the Court held that no Special Parole Term could be applied for drug conspiracy convictions under 21 U.S.C. § 846 because the statute mentioned only imprisonment, fines, or both.[12] Second, the court of appeals unduly minimized the significant differences between the two forms of post-release supervision. And third, it disregarded the anomalous implication of its decision that Congress would have mandated the imposition of a novel form of sentence that was as yet completely undefined and for which the standards for controlling discretion had not yet gone into effect.[13]

The decision below is based, in part, on the assumption that the omission of Special Parole Terms as to "high volume drug offenses" in the 1984 Act was an "error," and that "it is not reasonable to believe that Congress intended to correct a previous error by making the correction effective two years hence." App. A, 894 F.2d at 1405. Nothing in the legislative

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12. The result in Bifulco was eventually overriden by Congress, for offenses committed on or after November 18, 1988. Pub.L. 100-690, Title VI, § 6470(a), 102 Stat. 4377.

13. There is no problem here of any possible ex post facto violation. Mr. Gozlon's resentencing post-dated the effective date of the supervised release provisions, November 1, 1987, but his offenses were committed in February 1987. There has been no dispute in this case that under Art. I, § 9, cl. 3, of the United States Constitution, he cannot receive any "punishment more severe than the punishment assigned by law when the act to be punished occurred." Weaver v. Graham, 450 U.S. 24, 30 (1981). See also Miller v. Florida, 482 U.S. 423 (1987).

history of the 1986 amendments suggests that Congress viewed its 1984 action as having been in error, or that it intended to "correct" it. The presumption, of course, must be the opposite: that Congress intends to do what it did and that it need not state or explain its policy reasons for enacting laws. Nor, under Bilfulco, may a court assume that Congress cannot have intended the more lenient of two results, even in the context of anti-drug abuse legislation. Instead, several plausible explanations for the less harsh interpretation come to mind.

Congress might have thought that prisoners completing longer sentences would already be subject to longer periods of mandatory release supervision under 18 U.S.C. § 4164, making Special Parole redundant; or that such ex-offenders would be incorrigible, making it pointless; or that after serving longer terms this class of violators would be mellowed with age or more likely rehabilitated. Congress could make any of these judgments -- or any number of others -- without any requirement that they be expressed in legislative history, and without courts' being entitled to presume that a criminal sentencing provision must be given the more onerous of two interpretations.

Indeed, as revealed in the careful examination of the legislative history by the First Circuit in United States v. Ferryman, 897 F.2d 588 (1990), it is at least as likely that the use of the expression "supervised release" in those parts of the 1986 amendments which were to be immediately effective was itself the result of careless drafting rather than of thoughtful policymaking. It is no more illogical (or logical) to delay the

effective date of supervised release for more-than-100-gram heroin cases until a regime for its implementation and enforcement exists than to omit Special Parole for all drug conspiracy and attempt cases, as this Court found and enforced in Bifulco.

Special Parole Terms and terms of supervised release are not so readily interchangeable as suggested by the court below. The minimum length of any term of supervised release is longer than the comparable minimum Special Parole Term. If supervised release is revoked, there is no provision in the law for rerelease, and since the maximum term of supervision is in every case potentially unlimited, incarceration may in any case then be for life.[14] Moreover, the discussion by counsel for the Administrative Office, quoted with approval by the court below, App. A, 894 F.2d at 1404-05, emphasizing the more selective quality of supervised release as compared with the former parole system, is inapplicable to the controlled substance offenses under consideration here. In cases such as this, not only are all sentences nonparolable even under "old law," but supervised release is also made mandatory, not discretionary, and thus must be imposed even where, in the opinion of the sentencing judge, post-release supervision would serve no purpose in the particular case.

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14. On the other hand, if the term is not for life, a Special Parole Term, once revoked, may result in longer incarceration than a revoked term of supervised release. This is because when Special Parole is revoked, the total SPT is added to the unserved portion of the underlying term of imprisonment and the prisoner than may then face up to the total unserved balance, 21 U.S.C. § 841(c), whereas when supervised release is revoked, only that term is served. 18 U.S.C. § 3583(e)(3).

Under the regime envisioned by the court below, a sentencing judge is bound to impose a term of supervised release in imposing sentence for an offense committed between October 1986 and November 1987 despite the absence of any applicable definition of that term or standards for exercising the wide discretion allowed for selecting the term's duration. That is because 18 U.S.C. § 3583, which contains such provisions, was part of the Sentencing Reform Act and unambiguously did not go into effect until November 1, 1987, and by law does not apply to any offense committed before that date. Sentencing Act of 1987, Pub.L. 100-182, § 2(a), 101 Stat. 1266. As the Fifth Circuit put it in the leading case on this problem, what is more orderly and logical is "tying the effective date of the change to the effective date of the implementing statute." United States v. Byrd, 837 F.2d 179, 181 n.8 (5th Cir. 1988).

For all these reasons, this Court should grant this petition for certiorari and reverse the judgment of the United States Court of Appeals for the Third Circuit to the extent that it remanded petitioner Gozlon's case for imposition of terms of supervised release.

2. The Court should grant certiorari to make clear that its 1917 opinion in Hitchman Coal, holding that a statement is admissible as a coconspirator's admission even if made in furtherance of some joint enterprise other than a shared criminal objective, is no longer good law under Fed.R.Evid. 801(d)(2)(E), and to resolve the conflict in the circuits on this question.

For one person's statement to become another's vicarious admission under Fed.R.Evid. 801(d)(2)(E), the declarant and the

defendant must be coconspirators and the statements in question must have been made during and in furtherance of the conspiracy. In this case, petitioner Gozlon did not dispute on appeal that he had travelled with his severed codefendant Ellus Yehuda to Atlantic City and checked into a hotel with codefendant Yaffa Levy in Yehuda's presence. Nor did he dispute that it was he or Levy with whom Yehuda spoke by telephone on several occasions while Yehuda attempted to negotiate a heroin deal with the undercover agent. These conversations, however, were all held in a foreign language that the agent did not understand. The only evidence of what was said by petitioner in these conversations -- or even that they concerned the drug transaction -- consisted of Yehuda's statements, as recounted by the agent at trial. Petitioner thus denied that the evidence (other than the statements themselves) showed any participation on his part in Yehuda's scheme to sell heroin, rather than their joint participation in some other activity, coupled with Yehuda's pretending, simply to gain a negotiating advantage, that he was calling his source, who insisted on better terms than the agent was offering.

The courts of appeals are divided on the question of what it means to be "a coconspirator" in "the conspiracy" within the meaning of Rule 801(d)(2)(E). In Gov't of Virgin Is. v. Brathwaite, 782 F.2d 399, 403 & n.1 (3d Cir. 1986), the Third Circuit held that the independent evidence need show only a joint undertaking, and not shared criminality.[15] That is the dominant

15. On other occasions, the court below has seemed to follow a different rule. See, e.g., United States v. Inadi, 748 F.2d

view among the circuits. See United States v. Layton, 855 F.2d 1388, 1397-1400 (9th Cir. 1988), cert. denied, 103 L.Ed.2d 244 (Feb. 21, 1989) (agreeing with Third Circuit and collecting cases from several others). On the other hand, the Second Circuit has firmly ruled that the conspiracy referred to must be the charged conspiracy, or at least a criminal conspiracy. Id. at 1400 (listing 2d Cir. cases); see also United States v. Cambindo Valencia, 609 F.2d 603, 635-36 n.25 (2d Cir. 1979) (requiring statements to have been made in furtherance of the charged conspiracy, for reasons of efficient judicial administration of the trial).

Long prior to the enactment of the Federal Rules of Evidence, this Court had discussed this question and arguably opted for the broader view.

> In order that the declarations and conduct of third parties may be admissible in such a case, it is necessary to show by independent evidence that there was a combination between them and defendants, but it is not necessary to show by independent evidence that the combination was criminal or otherwise unlawful. The element of illegality may be shown by the declarations themselves. ... [W]hen any number of persons associate themselves together in the prosecution of a common plan or enterprise, lawful or unlawful, from the very act of association there arises a kind of partnership, each member being constituted the agent of all, so that the act or declaration of one, in furtherance of the common object, is the act of all, and is admissible as primary and original evidence against them.

812, 817 (3d Cir. 1984), rev'd on other grds., 475 U.S. 387 (1986); United States v. Gibbs, 739 F.2d 838, 844 & n.16 (3d Cir. 1984) (en banc), cert. denied, 469 U.S. 1106 (1985); United States v. Ammar, 714 F.2d 238, 250 (3d Cir.), cert. denied, 464 U.S. 936 (1983) ("complicity in the criminal enterprise").

Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229, 249 (1917); but cf. Anderson v. United States, 417 U.S. 211, 218 (1974) ("The hearsay-conspiracy exception applies only to declarations made while the conspiracy charged was still in progress, a limitation that this Court has 'scrupulously observed.'" [emphasis added]).

The Federal Rules, however, separated out the rule on coconspirators' declarations from all other statements of agents and imposed separate and more limited conditions on the former's admissibility. Rule 801(d)(2) provides, in pertinent part:

> A statement is not hearsay if -- ... (2) **Admission of party opponent.** The statement is offered against a party and is ... (D) a statement by the party's agent ... concerning a matter within the scope of the agency ..., made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

If coconspirator declarations were just another kind of agency admissions, the Rule would need no separate subsection (E) with its special limitations. Under subsection (E) of this rule, the defendant and the declarant must be shown to have been "coconspirator[s]" in a joint undertaking which can be described as "the conspiracy."

The language of the Rule does not require that a conspiracy count have been charged (although here it was), but it does necessarily require that a particular conspiracy be identified as that to which the proposed vicarious admissions may be related. "Coconspirator" is a legal term of art. Section 371 of Title 18, for example, criminalizes conspiracy to commit a federal offense by using the term "conspires" without definition or explanation.

The drafters of the Federal Rules cannot be presumed to have used such a term loosely. Two persons are not "coconspirators" unless they share a common criminal objective, known to and agreed to by both of them. United States v. Wexler, 838 F.2d 88 (3d Cir. 1987); United States v. Rosenblatt, 554 F.2d 36 (2d Cir. 1977). To allow statements to come into evidence on the basis of a mere "joint undertaking" is to disregard completely the language of the Rule.

The "joint enterprise" theory of Rule 801(d)(2)(E) also renders its "scope" and "furtherance" limitations impossible to enforce. If the defendant and the declarant need only be engaged in some "enterprise" or "undertaking" together, it would not be possible to ascertain whether the statements were made "during the course" of "the conspiracy" and "in furtherance of" it, as the Rule demands. Unless the conspiracy has a specific objective, it is not possible to say whether the statement tends to achieve that objective ("in furtherance"), nor to say whether that objective has been reached yet ("during the course").

In this case, petitioner Gozlon travelled with Levy and Yehuda from New York to Atlantic City, and they checked into hotel rooms together. Obviously, there was some sort of "common undertaking," legal or otherwise. But neither under the independent evidence test nor even under the regime of United States v. Bourjaily, 483 U.S. 171 (1987),[16] did the evidence preponderate toward

16. Petitioner argued below that under due process principles, analogous to the way in which the Ex Post Facto clause operates with respect to new statutory rules of evidence, Bourjaily could not be applied on appeal to this pre-Bourjaily trial. If this Court grants the writ and reaches this question, petitioner would seek to preserve that position.

making petitioner or Levy a "coconspirator" with Yehuda. Thus, under a proper application of Rule 801(d)(2)(E), the Yehuda statements should not have been admitted as evidence against the petitioner.

For this reason as well, this Court should grant the writ of certiorari and reverse the judgments of conviction, granting petitioner a new trial.

3. The Circuits are in conflict on the question whether the Special Assessment statute is invalid under the Origination Clause; this case presents the same question that this Court currently has under consideration in the Munoz-Flores case.

This Court granted certiorari in United States v. Munoz-Flores, 863 F.2d 654 (9th Cir. 1988), cert. granted, 110 S.Ct. 48, 107 L.Ed.2d 17 (Oct. 2, 1989) (No. 88-1932), to resolve the conflict in the Circuits on the question whether the Special Assessment law, 18 U.S.C. § 3013, was enacted in violation of the Origination Clause of the U.S. Constitution. Munoz-Flores is now pending decision after argument. This case presents the same question, see App. A, 894 F.2d at 1403 n.1 (dismissing the point on the basis of circuit precedent), and with regard to that issue should be resolved in accordance with the opinion in Munoz-Flores.

CONCLUSION

For each of the foregoing reasons, petitioner MOSHE GOZLON-PERETZ prays that this Court grant his petition for a writ of certiorari to review the judgments and opinions of the United States Court of Appeals for the Third Circuit affirming his conviction and remanding the sentence for imposition of terms of supervised release.

Respectfully submitted,

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Attorneys for Petitioner

April 25, 1990.

UNITED STATES of America

v.

Moshe GOZLON-PERETZ, Appellant.

No. 89-5330.

United States Court of Appeals, Third Circuit.

Submitted Under Third Circuit Rule 12(6) Oct. 16, 1989.

Decided Jan. 25, 1990.

As Amended Feb. 6, 1990.

Defendant was convicted of distribution of heroin. On appeal, the Court of Appeals, 865 F.2d 551, vacated sentence and remanded for resentencing. On remand, the United States District Court for the District of New Jersey, John F. Gerry, Chief Judge, sentenced defendant to five years special parole term. On appeal, the Court of Appeals, Becker, Circuit Judge, held that section of Anti-Drug Abuse Act of 1986 mandating supervised release terms became effective on date of its enactment and not on later effective date of Sentencing Guidelines.

Affirmed in part and vacated and remanded in part.

Criminal Law ⇐982.2

Section of Anti-Drug Abuse Act of 1986 mandating term of supervised release became effective on date of its enactment, not on later effective date of Sentencing Guidelines. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(b)(1)(A), as amended, 21 U.S.C.A. § 841(b)(1)(A).

Pamela A. Wilk, Philadelphia, Pa., for appellant.

Samuel A. Alito, Jr., U.S. Atty., Michael V. Gilberti, Asst. U.S. Atty., Edna Ball Axelrod, Chief Appeals Div., U.S. Atty's. Office, Newark, N.J., for appellee.

Before BECKER, COWEN and SEITZ, Circuit Judges.

OPINION OF THE COURT

BECKER, Circuit Judge.

This appeal by Moshe Gozlon-Peretz challenges the imposition of a five-year term of special parole, as part of a sentence for a drug conviction, on the ground that in February 1987, when the offense was committed, it was not punishable by a special parole term. During the 1970's and 1980's, special parole became a staple of the penalty scheme prescribed by Congress for drug offenses. However, in amending 21 U.S.C. § 841(b) pursuant to the enactment of the Comprehensive Crime Control Act of 1984, Congress failed to provide for special parole in § 841(b)(1)(A), which defines the high volume drug crime for which appellant was convicted and sentenced.

Appellant acknowledges that in the Anti-Drug Abuse Act of 1986, Pub.L. No. 99-570 Tit. I (1986) ("the ADAA"), which amended the 1984 Act, Congress created an alternative to special parole—the so-called term of supervised release. However, appellant contends that Congress intended supervised release to be complementary to the Sentencing Reform Act's new guidelines sentencing regime, which did not become effective until November 1, 1987. Because the offense in question occurred in February 1987, appellant submits that he is not subject to a term of supervised release either.

The government responds that Congress intended the 1986 legislation, which was enacted on October 27, 1986 and had no effective date provisions, to become effective immediately. Such a reading, the government maintains, requires the imposition of special parole, not supervised release, in this case. We do not agree with the government's contention that an immediate effective date would resuscitate the moribund special parole sentencing option, but we do believe that Congress intended the supervised release provisions to become effective immediately. Accordingly, we will vacate the judgment of sentence, and remand to the district court with directions to vacate the sentence of special parole and

App. A

to impose a term of supervised release.[1]

I.

A.

The background facts are set forth in our opinion in *United States v. Levy*, 865 F.2d 551 (3d Cir.1989) (in banc). There, we vacated Gozlon-Peretz's sentence and remanded for resentencing. On remand, the district court imposed large fines and lengthy prison terms followed by a five-year special parole term, pursuant to 21 U.S.C. § 841(b)(1)(A).

Before 1984, certain sentences imposed under the applicable sentencing provision in this case, 21 U.S.C. § 841(b), were required to include a special parole term. *See* 21 U.S.C. § 841(b) (1982). On October 12, 1984, Congress enacted the Comprehensive Crime Control Act, Pub.L. No. 98-473, 98 Stat. 1837, 1976 (1984) ("the Act"), which amended existing federal drug law.[2] Among these amendments, the Act created three levels of offenses based upon the weight of the drugs in question. Specifically, Congress amended § 841(b) by:

(1) eliminating special parole for offenses committed after the effective date of the Act (originally November 1, 1986, and later changed to November 1, 1987);

(2) redesignating old §§ 841(b)(1)(A) and (B) as new §§ 841(b)(1)(B) and (C), respectively; and

(3) creating a new class of sentences under "new" § 841(b)(1)(A), which provided for higher sentences for greater weights of drugs.

98 Stat. at 2030, 2068. *See also United States v. De Los Reyes*, 842 F.2d 755, 757 (5th Cir.1988). Apparently through oversight, new § 841(b)(1)(A) did not mention a special parole term. Acknowledging that oversight, neither party here contends that special parole or supervised release can be imposed for crimes committed between October 12, 1984 and October 27, 1986, the date of the ADAA's enactment. *See United States v. Phungphiphadhana*, 640 F.Supp. 88 (D.Nev.1986); *United States v. Mowery*, 703 F.Supp. 940 (M.D.Ga.1989). Appellant maintains, however, that special parole cannot be imposed on any § 841(b)(1)(A) offense committed between October 12, 1984, and November 1, 1987, the effective date of the Sentencing Reform Act.

In § 1002 of the ADAA, Pub.L. No. 99-570, 100 Stat. 3207-2 to 3207-4 (1986), Congress again amended § 841(b) by:

(1) striking the existing §§ 841(b)(1)(A) and (B);

(2) reattaching and redesignating § 841(b)(1)(C) as § 841(b)(1)(D);

(3) adding three new subsections: new §§ 841(b)(1)(A), (B), and (C),

(4) attaching mandatory "supervised release" to new §§ 841(b)(1)(A), (B), and (C).

The amendments thus prescribed four offense levels instead of three, based upon the weight of the drugs. These enhanced prison terms and fines and the attendant terms of "supervised release" were made applicable to the first three parts of § 841(b), including § 841(b)(1)(A), the section under which appellant was sentenced. Section 1002 did not carry an express provision for its effective date.

In contrast, section 1004 of the ADAA, Pub.L. No. 99-570, 100 Stat. 3207, 3207-6 (1986), which deleted all remaining references to special parole terms and substituted for them the term "supervised release," specifically provided that it was to take effect at the same time as 18 U.S.C. § 3583, which was part of the Sentencing Reform Act, 18 U.S.C. § 3551 *et seq.* (Supp. IV 1986). Because of a legislative postponement, that Act, originally scheduled to go into effect on November 1, 1986, did not go into effect until November 1, 1987. *See* Pub.L. No. 99-217, § 4, 99 Stat. 1728 (1985).

1. The appellant's only other claim—that the district court's imposition of a special assessment of $50.00 on each count was invalid because 18 U.S.C. § 3013 was enacted in contravention of the origination clause, U.S. Const. art. I, § 7, cl. 1—has been foreclosed by our opinion in *United States v. Simpson*, 885 F.2d 36 (3d Cir.1989).

2. The Sentencing Reform Act was one chapter of the Comprehensive Crime Control Act. *See* 98 Stat. 1976, 1987.

B.

We find that under § 1002 of the ADAA, appellant is subject to a mandatory minimum five-year term of supervised release in addition to his term of imprisonment. That is the result reached on essentially identical facts in *United States v. Torres*, 880 F.2d 113 (9th Cir.1989), which held that the regime of supervised release under § 841(b)(1)(A) came into being on October 27, 1986, the date of enactment of the ADAA. A number of other cases hold that § 1002 did not go into effect (and supervised release for drug cases did not come into being) until November 1, 1987. *See United States v. Whitehead*, 849 F.2d 849, 860 (4th Cir.1988); *United States v. Smith*, 840 F.2d 886, 889 (11th Cir.1988); *United States v. Byrd*, 837 F.2d 179, 181 (5th Cir. 1988). These cases are arguably explained by the fact that they all involved lower volume drug offense provisions, for which special parole was not abolished until November 1, 1987. *See* § 1004(b) of the ADAA, 100 Stat. at 3207-6. In each of these cases, the courts vacated terms of supervised release and directed that the district court impose terms of special parole instead, thus treating supervised release and special parole as somewhat interchangeable concepts. That course of action cannot be followed here because no special parole term is available for violations of § 841(b)(1)(A) occurring after October 12, 1984.

We do not dispute that special parole and supervised release are closely related mechanisms for post-release supervision of federal offenders.[3] However, the substitution of supervised release for special parole of federal offenders was not accidental:

> The legislative history of the [Sentencing Reform Act of 1984] shows that Congress was dissatisfied with the "old" law which conditioned the length of time a defendant was supervised on parole solely on the length of the original term; the smaller percentage of the term a prisoner served in prison, the longer the period of parole supervision. Congress decided to replace this system with one that would make both the existence and the length of post-incarceration supervision dependent on the judge's decision as to whether community supervision was needed in an individual case. The Senate Report in the section-by-section analysis explained this approach:
>
> > Unlike current law, however, probation officers will only be supervising those releasees from prison who actually need supervision, and every releasee who does need supervision will receive it.
>
> Slawsky, Looking at the Law, 53 Federal Probation 69, 70 (June 1989) (quoting S.Rep. No. 225, 98th Cong., 2d Sess 125, *reprinted in* 1984 U.S.Code Cong. & Admin.News 3182, 3308). Thus, Congress had more than formal reasons for supplanting (special) parole with supervised release, and to the extent that the *Whitehead*, *Smith*, and *Byrd* courts found the two mechanisms to be substantively the same, we disagree with their holdings.

We hold that supervised release became effective on October 27, 1986. We acknowledge that supervised release was conceptually linked to the regime of the Sentencing Reform Act, which did not become effective until November 1, 1987, but we do not believe that supervised release terms are inseparable from the Sentencing Reform Act's regime. Two basic principles of statutory construction compel our holding. First, absent indication to the contrary, a statute takes effect on the date of its enactment. *See Air-Shields, Inc. v. Fullam*, 891 F.2d 63, 65 (3d Cir.1989); 2 Sutherland's Statutory Construction § 33.06 (4th ed. 1986). Second, courts must impute a reasonable purpose to Congress, and it is unreasonable to think that Congress want-

3. The bill originated in the Reagan Administration, not the Congress. As sent by the President to the Congress, *see* "The Drug Free America Act of 1986: A Proposal to Congress From the President of the United States," the bill spoke of special parole. *See* Proposal § 502(1)(A)(VIII). It was Congress that invented "supervised release."

ed to maintain special parole for all offenses committed up until November 1, 1987. A number of considerations support this view, as reasoned by Ms. Slawsky, Assistant General Counsel of the Administrative Office of the United States Courts:

> [G]iven the relatively long periods of incarceration required by these sections, by the time most of these defendants returned to the community, the supervised release provisions of the Sentencing Reform Act would be in effect, and . . . by the time some of the defendants served their long mandatory minimum terms of imprisonment, the Parole Commission would no longer be in operation to supervise special parole terms.

Slawsky, *supra*, at 86. Thus, supervised release will de facto replace special parole for offenses committed after November 1, 1987. Furthermore, supervised release will be administered by the federal probation service whereas special parole is administered by the United States Parole Commission, which will expire by operation of law in 1992. *See* section 235 of the Sentencing Reform Act, 98 Stat. at 2031-32, (stating that chapter 311 of Title 18 of the United States Code, 18 U.S.C. § 4201 *et seq.*, remains in effect until five years after the effective date of the Act). Although a successor agency will doubtless be created, its anatomy and powers are unknown.

Additionally, to the extent that Congress did inadvertently leave special parole out of the 1984 Act and intended to correct its error with respect to high volume drug offenses in the ADAA, it is not reasonable to believe that Congress intended to correct a previous error by making the correction effective two years hence. Thus, we hold that supervised release came into effect with the enactment of the ADAA, on October 27, 1986.[4]

We recognize that this holding perpetuates a circuit split. We join the Ninth Circuit in holding that supervised release became effective when the ADAA became effective. Although the Fourth, Fifth and Eleventh Circuits were not faced with situations where the defendant would be unsupervised (the defendants in those cases were charged with distributing smaller quantities of drugs so that special parole applied, *see supra* at 1404), the district courts in those circuits are bound by the *Whitehead*, *Smith*, and *Byrd* decisions "across the board." At first reading this point may seem technical, but its practical consequences are enormous because responsibility for supervising post-release offenders will be divided, for no logical reason, between the probation service, for people sentenced to supervised release, and the U.S. Parole Commission or its successor, for people sentenced to special parole.[5] The problem is compounded by the fact that supervision by the judiciary is frequently transferred from one district to another, *see* 18 U.S.C. § 3605, and the transferee district may be in a different circuit with a different rule as to whether special parole or supervised release is the proper sentence. The anatomy of the problem that may arise in the event that such a sentence is challenged in a proceeding under 28 U.S.C. § 2241 is described in the margin.[6] For these reasons the Supreme Court might wish to consider resolving the circuit conflict.

The judgment of sentence will be vacated and the case remanded with directions to impose a term of supervised release in lieu of a term of special parole. In all other respects, the judgment of sentence will be affirmed.

4. We do not find the explicit invocation of the later effective date (November 1, 1987) for "the amendments made by this section" in § 1004(b) of the ADAA, 100 Stat. at 3207-6, to be inconsistent with our holding. The "section" referred to in § 1004 means only § 1004 itself, not the entire ADAA, and the amendments referred to, contained in § 1004(a), strike out the term "special parole" and insert the term "supervised release." These amendments were necessary because, although § 1002 of the ADAA inserted supervised release for some offenses which had previously been special parole offenses (21 U.S.C. § 841(b)(1)(A), (B) & (C)), it did not insert supervised release for all special parole offenses. For instance, special parole was retained for 21 U.S.C. §§ 841(b)(1)(D), 845, 845a, 845b, and 960(b)(4). Thus, § 1004(b) was necessary to effectuate the change from special parole to supervised release for all those offenses for which the ADAA had not already implemented supervised release.

5. We note that a special parole term may require more community supervision because, upon revocation of a special parole, an individual may be re-paroled. By comparison, after revocation of a supervised release term, there is no provision for additional post-release supervision.

> We also note in this regard that the government's argument that special parole, not supervised release, is the appropriate post-release supervision mechanism to fill the void created by the legislative confusion, is undermined by the fact that Congress, in passing the ADAA, perpetuated special parole for some offenses, but not for others. It appears that Congress knew which offenses it wanted special parole to apply to in the interim period, and 21 U.S.C. § 841(b)(1)(A) was not one of them.

6. Assume a transferor district on a regime of supervised release and a transferee district on a regime of special parole. While many courts may find that the sentence as imposed is the sentence that controls, this situation will at the very least lead to increased litigation. In this situation, if the Court attempts to revoke supervised release, the defendant can claim that the Parole Commission has jurisdiction and that the Commission's reparole guidelines should apply. A defendant in such a situation could also claim that he is entitled to early termination of parole pursuant to 18 U.S.C. § 4211(c), a provision that has no parallel for supervised release. Such scenarios serve to underscore that, given the clear split in the circuits, similarly situated releasees will often be treated differently.

The UNITED STATES

v.

Philip Henry OLECK and David Bedell.

Appeal of David BEDELL.

No. 89-3461.

United States Court of Appeals, Third Circuit.

Submitted Oct. 10, 1989.

Decided Jan. 25, 1990.

Narcotics defendant appealed from decision of the United States District Court for the Western District of Pennsylvania, Glenn E. Mencer, J. The Court of Appeals, Becker, Circuit Judge, held that district court had authority to impose term of supervised release for offense committed after date of enactment of Anti-Drug Abuse Act of 1986 but before effective date of section of that Act substituting "supervised release" for all remaining "special parole" offenses.

Affirmed.

Criminal Law ⇐982.2

District court had authority to impose term of supervised release for offense committed after date of enactment of Anti-Drug Abuse Act of 1986 but before effective date of another section of Act substituting "supervised release" for all remaining "special parole" offenses. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(b)(1), as amended, 21 U.S.C.A. § 841(b)(1).

David Bedell, Elgin, Fla., pro se.

Paul J. Brysh, Asst. U.S. Atty., Pittsburgh, Pa., for appellee.

Before BECKER, GREENBERG and VAN DUSEN, Circuit Judges.

OPINION OF THE COURT

BECKER, Circuit Judge.

This appeal presents the same question as that posed in the companion case, *United States v. Gozlon-Peretz*, 894 F.2d 1402 i.e. whether the district court had authority to impose a term of supervised release for a sentence imposed pursuant to 21 U.S.C. § 841(b)(1) for an offense committed after October 27, 1986, the date of enactment of the Anti-Drug Abuse Act of 1986 (ADAA), but before November 1, 1987, the effective date of ADAA section 1004.[1] Appellant

1. Section 1002 of the ADAA replaced old §§ 841(b)(1)(A), (B) and (C) with new provisions that included supervised release terms, not special parole terms. 100 Stat. 3207-2 to 3207-4

UNITED STATES of America

v.

Yaffa LEVY, a/k/a "Annette Amar", Appellant in No. 87-5595,

UNITED STATES of America,

v.

Moshe GOZLON-PERETZ, a/k/a "Pasquale DiStefano", Appellant in No. 87-5596,

UNITED STATES of America,

v.

YEHUDA, Ellus, a/k/a "Holly Berthold" Appellant in No. 87-5613.

Nos. 87-5595, 87-5596 and 87-5613.

United States Court of Appeals, Third Circuit.

Argued June 15, 1988.

Nos. 87-5595 and 87-5596 Reargued En Banc ~~June 15~~ Nov. 7, 1988.

No. 87-5613 Submitted Pursuant to Third Circuit Rule 12(6) Nov. 7, 1988.

Decided Jan. 9, 1989.

Defendants were convicted of distribution of heroin before the United States District Court for the District of New Jersey, John F. Gerry, Chief Judge, and defendants appealed. The Court of Appeals, Stapleton, Circuit Judge, held that: (1) independent evidence existed sufficient to allow admission of one codefendant's statements as those of coconspirators against the others; (2) evidence of one defendant's possession of one passport in false name was admissible at trial; (3) one defendant's sentence was remanded; and (4) district court on remand should explain imposition of fine on indigent defendant.

Affirmed in part and vacated and remanded in part.

1. Criminal Law ⇐427(5)

Independent evidence existed sufficient to admit statements made by one narcotics defendant to undercover federal officer to be admissible as statement of coconspirators in trial of other codefendants; first codefendant's use of telephone and immediate change of bargaining position during negotiations afterwards, his prior inability to acquire heroin independently, tenor of negotiations demonstrating declarant defendant was broker not supplier, agent's evaluation that first codefendant was in fact caught in the middle by a supplier, and second and third codefendant's possession of beeper which first codefendant repeatedly dialed during negotiations was sufficient. Fed.Rules Evid.Rule 801(d)(2)(E), 28 U.S.C.A.

2. Criminal Law ⇐351(5)

Evidence of defendant's possession of foreign passport issued in false name was admissible in narcotics trial; defendant's use of false name and passport in checking into hotel rooms used for heroin distribution, and use of that name upon arrest was relevant as to her consciousness of guilt. Fed.Rules Evid.Rules 403, 403 note, 404(b), 28 U.S.C.A.

3. Drugs and Narcotics ⇐123(3)

Evidence was sufficient to demonstrate that one codefendant had sufficient knowledge and intent to convict her of heroin distribution charges; codefendant's use of false names to rent hotel rooms used as command post, use of false name to mislead police after arrest, another codefendant's presence with her, and her participation in negotiations to allow drug sale was sufficient. 18 U.S.C.A. § 2; Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 406, as amended, 21 U.S.C.A. §§ 841(a)(1), 846.

4. Drugs and Narcotics ⇐123(3)

Evidence was sufficient to demonstrate that one codefendant had sufficient knowledge and intent to convict him of heroin distribution charges; defendant's presence with codefendant in command post used for distribution, use of false name, and statements by another coconspirator indicating he was supplier of heroin was sufficient. 18 U.S.C.A. § 2; Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 406, as amended, 21 U.S.C.A. §§ 841(a)(1), 846.

App. B

5. Criminal Law ⇐1181.5(8)

In light of probability that prosecuting attorney and sentencing judge had misconception about legal effect of defendant's conviction for heroin distribution counts at his sentencing, defendant's sentences were vacated and remanded for resentencing. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(b)(1)(A)(i), (b)(1)(B)(i), 406, as amended, 21 U.S.C.A. §§ 841(b)(1)(A)(i), (b)(1)(B)(i), 846; U.S.C.A. Const.Amend. 6.

6. Criminal Law ⇐1181.5(1)

Where sentences imposed on two of three counts are vacated and are all three arose from same criminal transaction, it was appropriate to vacate the third.

7. Criminal Law ⇐986(3)

It would be preferable practice for district court, on remand for resentencing of defendant who had already been determined to be indigent, to accompany imposition of $200,000 fine with explanation of its purpose.

Samuel A. Alito, Jr., U.S. Atty., Michael V. Gilberti (argued), Asst. U.S. Atty., Newark, N.J., for appellee.

Roger Bennet Adler (argued), Roger Bennet Adler, P.C., New York City, for appellant Yaffa Levy

Peter Goldberger, Pamela A. Wilk (argued), Alan Ellis, Law Offices of Alan Ellis, P.C., Philadelphia, Pa., for appellant Moshe Gozlon-Peretz.

Salvatore J. Avena, Avena, Friedman and Klamo, Camden, N.J., for appellant Ellus Yehuda.

Argued June 15, 1988

Before MANSMANN, SCIRICA, and COWEN, Circuit Judges.

Reargued En Banc ~~June 15~~ Nov. 7, 1988

Before SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA and COWEN, Circuit Judges.

OPINION OF THE COURT

STAPLETON, Circuit Judge:

I.

Appellants Yaffa Levy and Moshe Gozlon-Peretz were convicted by a jury in the United States District Court for the District of New Jersey on three counts. Count One of the Superseding Indictment charged participation in a conspiracy to distribute more than a kilogram of heroin, in violation of 21 U.S.C. §§ 841(a)(1), 846 (1982). Count Two charged distribution of approximately 240 grams of heroin, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2 (1982). Count Three charged possession with intent to distribute in excess of one kilogram of heroin, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. Prior to the trial, appellant Ellus Yehuda, a codefendant, pleaded guilty to possession with intent to distribute two kilograms of heroin.

At trial, the government relied primarily upon the testimony of Special Agent Paul Maloney, an undercover DEA agent, to convict defendants Levy and Gozlon-Peretz of, *inter alia*, conspiracy to distribute heroin on or about February 26, 1987. While Maloney was on the stand, the government elicited testimony concerning out of court statements made by Yehuda during the negotiations leading to the sale of the heroin to Maloney. The government tendered much of that testimony as probative of the truth of the assertions made by Yehuda. After Levy and Gozlon-Peretz objected to the admissibility of this evidence on hearsay grounds, the government urged that it was admissible under Federal Rule of Evidence 801(d)(2)(E) as statements made "by a coconspirator of a party during the course and in furtherance of the conspiracy." The district court applied the then governing circuit precedent, *United States v. Ammar*, 714 F.2d 238 (3d Cir.), *cert. denied*, 464 U.S. 936, 104 S.Ct. 344, 78 L.Ed.2d 311 (1983), and admitted the tendered evidence. Its action was premised

on a finding pursuant to the *Ammar* standard that the record evidence, without reference to the purported co-conspirator statements, made it more likely than not that those statements were made in furtherance of a then existing conspiracy of which the defendants were members. Yehuda was available to testify at the trial but neither side chose to call him to the stand.

After the defendants were sentenced and while their appeals were pending before this court, the Supreme Court of the United States decided *United States v. Bourjaily*, 483 U.S. 171, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987). In that case, the Court disapproved the test articulated in *Ammar*, holding that a trial judge may consider all evidence, including the tendered out of court statements of the alleged co-conspirator, in deciding whether to admit the statements.

Several issues are raised in this appeal from the defendants' convictions: 1) whether there was sufficient independent evidence under this court's decision in *Ammar* to warrant the admission under Rule 801(d)(2)(E) of the out of court statements made by alleged co-conspirator Yehuda; 2) whether the false passports of the defendants and their use of false names were properly admitted into evidence; 3) whether, assuming the admissibility of the co-conspirator statements and the evidence regarding false identification, there was enough evidence to support Levy's and Gozlon–Peretz's convictions; 4) whether retroactive application of *Bourjaily* to this case would violate notions of fundamental fairness inherent in the Due Process Clause of the Fifth Amendment; 5) whether, assuming *Bourjaily* is to be applied retroactively, there was sufficient evidence to permit the admission of the co-conspirator statements; 6) whether there is an unacceptable risk that the sentences imposed on Gozlon–Peretz and Yehuda were influenced by a misunderstanding on the part of the sentencing judge regarding the parole provisions of the Anti–Drug Abuse Act of 1986, Pub.L. 99–570, §§ 1002, 1003, 100 Stat. 3207–2 (codified at 21 U.S.C. § 841(b)(1) (Supp. IV 1986)); and 7) whether the district court erred in failing to make factual findings regarding Yehuda's ability to pay the $200,000 fine imposed upon him.

In keeping with the preferred practice of avoiding unnecessary decisions of constitutional issues, we first address the issue of whether the district court properly applied the *Ammar* standard when it admitted Yehuda's out of court statements. Because we hold that there was enough independent evidence to warrant the admission of these statements under *Ammar*, we do not reach the issue of whether *Bourjaily* could be applied here without violating due process. We also hold that the false passports and use of false identities were admissible, and that there was sufficient evidence to support Levy's and Gozlon–Peretz's convictions. We will vacate the sentences of Gozlon–Peretz and Yehuda, however, and remand for resentencing.

II.

In March, 1986, a government informant introduced Special Agent Paul Maloney of the Drug Enforcement Agency to Yehuda. For the next eleven months, Maloney, acting in an undercover role, negotiated with Yehuda in an attempt to purchase large quantities of heroin. During these eleven months Maloney had approximately fifteen to sixteen telephone conversations and half a dozen "face-to-face" meetings with Yehuda. At each of the approximately six "face to face" meetings, Yehuda and Maloney tried to negotiate a heroin transaction. None of these transactions were ever consummated; the main sticking points were Yehuda's demand that Maloney give him money "up front" before delivery of the heroin, and Yehuda's apparent inability to obtain and produce any heroin despite his repeated promises. During these negotiations Yehuda stated that he had one source of heroin in Chicago and two in Thailand.

On February 24, 1987, Yehuda called Maloney at his Atlantic City office and said that "he had something" for Maloney. They agreed to meet the next afternoon at the Pennsylvania railroad station in Newark, New Jersey. They met as arranged. During the meeting Yehuda reported that

he had met "a friend" in New York whom he had previously seen in Thailand and that his friend had entered the United States with about five kilograms of heroin. Yehuda then gave Maloney a small package which later analysis revealed contained 23.6 grams of 27 percent pure heroin hydrochloride. Upon receiving the sample, Maloney told Yehuda that he would return with it to Atlantic City and have it tested; he added that if everything worked out well, he would want to buy at least one kilogram. Yehuda responded that the price would be about $200,000 per kilogram and that he would have to check with his friend to make sure everything was all right.

At this point, Maloney and Yehuda proceeded to a pay phone in the sky walk connecting the station and the Hilton Hotel. Maloney asked Yehuda if the transaction could be consummated in Atlantic City because he not only felt safer there but could also guarantee everyone else's safety. Yehuda replied that he would check this with "his man." Upon reaching the phone, Yehuda, referring to a piece of paper, punched in a series of numbers and hung up the phone. In response to Maloney's question as to whether the line was busy, Yehuda said that he had to call a beeper number and that his call would be returned. Maloney read from Yehuda's paper one of the numbers, 401–4532, that Yehuda had used. Several minutes later Yehuda received an incoming call on the pay phone. The call lasted several minutes and was carried out in a foreign language.

After this second call, Yehuda said that it was agreed that the transaction would be done in Atlantic City, but that his friend wanted to do it one pound at a time. Yehuda explained that "his friend" wanted Yehuda to deliver one pound to Maloney, receive $110,000, then go back to get the second pound and deliver it to Maloney in return for the remainder of the purchase price ($90,000). In response to Maloney's concern about completing the transaction anywhere but Atlantic City, Yehuda said that since Maloney was the buyer, "they" would complete it wherever he wanted.

The government subsequently obtained records from a Novotel Hotel in New York City which showed that a phone call had been made to the pay phone in the Newark skywalk at 1:44 pm on February 25, 1987 from a room registered to Annette Amar, an alias used by Yaffa Levy.

At 6:55 pm the next day, Levy, Gozlon–Peretz and Yehuda arrived together at the Sands Hotel; Levy rented room 1002 using an Israeli passport in the name of Annette Amar. The hotel desk clerk testified that she saw a full red bag among the defendants' luggage. At 7:05 pm Yehuda and Maloney met at an arranged spot in the Golden Nugget Hotel lobby; Yehuda was carrying a large red bag. After proceeding to Maloney's hotel room in the Golden Nugget, Yehuda stated that he had come to Atlantic City with "his friend" and asked Maloney if he had a balance that he could borrow as his had been too bulky to bring. Maloney lent Yehuda his electronic scale, and Yehuda put it into his red bag. Yehuda stated he was going to leave the scale with "his friend" while he, Yehuda, brought the first installment of drugs to Maloney. Yehuda was to have returned the scale with the second instaliment, at which point Maloney would have used the scale to weigh the total delivery. They then returned to the lobby and Maloney asked Yehuda if he wanted to call his friend prior to meeting him. Yehuda declined to call, stating that "his friend" was "there" and he would go "right to there." Appendix at 56.

Yehuda was followed by a detective Imfeld of the Atlantic City Police Department from the Golden Nugget Hotel to the Sands Hotel. Yehuda hired a taxi and took a very circuitous route back to the Sands Hotel, which included retracing his steps and making a "U" turn. Yehuda also repeatedly looked out the back window during the ride. When he arrived at the Sands Hotel he walked in circles and looked around the lobby for fifteen minutes. Yehuda then went to the elevator bank and waited for an empty elevator. Once in the elevator, Yehuda kept it on the ground floor for a "good minute" and then pushed the fifth and tenth floor buttons. After

the elevator went to the tenth floor it came straight down empty.

At 8:40 pm Yehuda, carrying the red bag still containing the scale, returned to the Golden Nugget. Yehuda told Maloney that "his friend" had told him that Yehuda must see or obtain at least half the money before proceeding further. Maloney replied that this was unsatisfactory and that they had already agreed on the structure of the exchange. Yehuda then said that "it was difficult, that he had no control over it, that he was—you know, he was caught in the middle." *Id.* at 57. Maloney told Yehuda that if he had to "front" the money, the sale was off, but he did ask Yehuda to call his friend and see if a compromise could be worked out. Yehuda went to a pay phone, asked Maloney to walk around, and then talked in a foreign language for less than five minutes. After the telephone conversation, Yehuda reported to Maloney that it might be possible for Yehuda to deliver 100 grams to Maloney, at which point Maloney would show Yehuda the money. Although Maloney agreed to this arrangement, Yehuda said that he had to await another phone call as he "hadn't spoken to the guy but had spoken to his girlfriend who was in the hotel room, that the man wasn't there and that she could only say that the guy would probably give [Maloney] a hundred grams." *Id.* at 58.

Yehuda received the return call at the pay phone shortly thereafter and talked for a couple of minutes in a foreign language. Upon completing the call, Yehuda reported to Maloney that "his friend" was adamant about seeing the money first and that if he did not the transaction would not be completed. Maloney rejected the new terms, made a counter offer, and asked Yehuda to call his friend again. Yehuda complied, using the same phone as before. Maloney reported that after Yehuda placed the call, he heard Yehuda ask for room 1002 in English. After this call, Yehuda reported that "his friend" would not agree to Maloney's suggestion. They then walked through the lobby arguing about the fact that Yehuda had agreed to complete the sale one way but was now changing the agreement. During this exchange, Yehuda said that he was as surprised as Maloney when the plans were changed and that "it was difficult being caught in the middle, that he was caught between two hard dealing people, that [Maloney] wouldn't bend and his friend wouldn't bend and that he hated doing business that way." *Id.* at 60.

At 10:55 pm Yehuda, carrying the red tote bag, rented room 1430 at the Sands Hotel using the name "Holly Berthold." At approximately 11:15 pm Maloney received a message on his beeper to call a certain number. The number was that of a pay phone in the lobby of the Sands Hotel; Yehuda answered it. Yehuda told Maloney that his "friend" had relented and that he was willing to do the transaction the way Maloney had suggested; the first installment, however, was to be only 250 grams Maloney agreed to these terms and arranged to meet Yehuda a little later.

Maloney and Yehuda met around 11:45 pm. Yehuda gave Maloney a package containing 185 grams of heroin. Moments later agents moved in and arrested Yehuda.

During the subsequent search of rooms 1002 and 1430 and the associated follow-up investigation, additional evidence was discovered. Two calls were placed from room 1002 to the pay phone Yehuda had been using the evening of February 26, 1987; one had been placed at 8:59 pm and the other at 9:55 pm. The times coincided with Yehuda's telephone conversations in Maloney's presence. During a search of room 1002, the following items were found: 1) a beeper, on a shelf near the bed with the number 401-4532 inscribed on its back; 2) foreign passports in the names of Pasquale DiStefano and Annette Amar; 3) two consecutively numbered Greyhound bus tickets from New York to Resorts International; and 4) a bill from the New York Novotel Hotel. A third Greyhound bus ticket, with a number consecutive with the two seized in room 1002, was found on Yehuda's person.

A search was also conducted of room 1430 rented by Yehuda using a passport issued in the name of Dert... Holly.[1] During the search 2,127 grams of 24 percent heroin hydrochloride and a red tote bag were recovered.

When questioned after their arrest, Gozlon-Peretz and Levy identified themselves by the aliases Pasquale DiStefano and Annette Amar respectively.

III.

A.

[1] Federal Rule of Evidence 801(d)(2)(E) provides that out of court statements made by a "coconspirator of a party during the course and in furtherance of the conspiracy" are not hearsay. The requirements of the rule are met if the person against whom the statement is offered participated in a conspiracy, the statement was made in furtherance of the conspiracy, and the conspiracy was still in progress at the time the statement was made. *Ammar*, 714 F.2d at 245; *United States v. Gibbs*, 739 F.2d 838, 843 (3d Cir.1984) (en banc), *cert. denied*, 469 U.S. 1106, 105 S.Ct. 779, 83 L.Ed.2d 774 (1985). As we have noted, before *Bourjaily* this court required the prosecution to demonstrate these three facts by a "fair preponderance of the independent evidence." *Gibbs*, 739 F.2d at 843 (quoting *United States v. Trotter*, 529 F.2d 806, 811-813 (3d Cir.1976)); *see Ammar*, 714 F.2d at 247. Thus, an out of court statement offered as a statement of a coconspirator was admissible only if evidence other than the statement itself made it more likely than not that the defendant participated in the alleged conspiracy and that the statement was made during and in furtherance of that conspiracy. *See Gibbs*, 739 F.2d at 843, (quoting *Trotter*, 529 F.2d at 812 n. 8). The trial judge in this case correctly identified this as the then governing standard.

Levy and Gozlon-Peretz assert that the independent evidence falls short of establishing by a preponderance of the evidence that they participated in a conspiracy with Yehuda. They do not dispute that if such a conspiracy were shown, the statements could be found to have occurred in furtherance and in the course of that conspiracy. Thus, in reviewing the district court's decision to admit Yehuda's statements under *Ammar*, our inquiry is restricted to "whether, viewing the [other] evidence in the light most favorable to the government, the district court had 'reasonable grounds' for concluding that, more probably than not, [the defendants] were coconspirators." *United States v. Inadi*, 748 F.2d 812, 817 (3d Cir.), *rev'd on other grounds*, 475 U.S. 387, 106 S.Ct. 1121, 89 L.Ed.2d 390 (1986); *see United States v. Janotti*, 729 F.2d 213, 218 (3d Cir.1984), *cert. denied*, 469 U.S. 880, 105 S.Ct. 243, 244, 83 L.Ed.2d 182 (1984). We hold that the district court did have reasonable grounds for so concluding.

We start with the undisputed proposition that Yehuda went to Atlantic City in February of 1987 to offer for sale and deliver a substantial quantity of heroin. It is equally clear that Yehuda was accompanied on this trip by Levy and Gozlon-Peretz and that they occupied the same hotel room during most of the time the negotiations were ongoing. Accordingly, the issue for decision is whether there is independent evidence which, when added to Levy's and Gozlon-Peretz's association with Yehuda and their proximity to the transaction, permits an inference that they were involved in the selling of the heroin. We now turn to that evidence.

The independent evidence established that Yehuda repeatedly interrupted the negotiations to use the telephone and that he repeatedly changed his position immediately following such use. Two explanatory hypotheses have been advanced by the parties in connection with this evidence. Levy and Gozlon-Peretz suggest that Yehuda was negotiating solely on his own account and was using the apparent telephone calls as a ruse to put himself in a better bargaining position. The government, on the other

1. The hotel clerk apparently miscopied the name in Yehuda's false passport, misreading Holly Berthold for Derthon Holly.

hand, urges that Yehuda was acting as a broker whose role was to bring Maloney together with a party who had a large quantity of heroin to sell. Based on the independent evidence, we conclude that the district court could properly infer that Yehuda was not dealing on his own account and that the calls involved conversations with co-conspirators. Moreover, having drawn this inference, we believe the district court had ample reason to further conclude that Levy and Gozlon-Peretz were the co-conspirators whom Yehuda contacted by telephone.

First, with respect to Yehuda's role in the transaction, we find it significant that during the eleven months leading up to the February sale, Maloney had been attempting unsuccessfully to purchase heroin from Yehuda. Despite many promises to provide Maloney with samples, Yehuda had never been able to produce any heroin. In fact, one of the sticking points between Maloney and Yehuda in their negotiations was Maloney's refusal to finance Yehuda's excursions abroad to obtain heroin and arrange for suppliers. If Yehuda had had the ability to supply heroin on his own account, it would seem likely that he would have fulfilled his promises and delivered heroin to Maloney during their many dealings in 1986. His failure to do so is supportive of the inference that he was not dealing on his own account in February of 1987.

In addition, the nature of the sticking points in the February 25th and 26th negotiations were not over price or purity, as one would expect if Yehuda were the supplier trying to use clever bargaining strategy to increase his profits; rather Yehuda and Maloney haggled over who should perform first. Yehuda wanted Maloney to pay before he delivered the drugs, and Maloney wanted the transaction done in two steps, with half of the drugs being exchanged for half the money at each stage. These disagreements are more characteristic of a broker taking instructions from a cautious supplier who did not know or trust the buyer, than of a supplier trying to drive a hard bargain with a known purchaser.

Finally, the district court was entitled to credit Maloney's evaluation that Yehuda was genuinely frustrated by finding himself "caught in the middle" and unable to consummate the transactions as planned. That frustration is supportive of the inference that Yehuda was not dealing solely on his own account and that the telephone calls were conversations with his co-conspirators.

Second, with respect to the identity of Yehuda's co-conspirators, we find the inference for which the government contends compelling. The first call made by Yehuda in Newark was placed to a beeper later found in the Sands hotel room engaged by Levy and occupied by Levy and Gozlon-Peretz. That call was returned from the New York Novotel Hotel room also occupied by them. Likewise, in Atlantic City, Yehuda made at least one call to room 1002 and two of his other calls were returned from that room.

Moreover, there are three other indications that Levy and Gozlon-Peretz were the ones in league with Yehuda. It can be inferred that the 'counter surveillance' techniques used by Yehuda on his way to the Sands Hotel from his 7:05 pm meeting with Maloney were an attempt to protect the people and drugs in room 1002 from detection. In addition, the absence of other contacts between Yehuda and third parties, as revealed by police surveillance, tends to exclude the likelihood of an unknown third party being the supplier. Finally, the 'guilty consciousness' demonstrated by Levy and Gozlon-Peretz in giving false names upon arrest also tends to indicate that they were not just innocent bystanders vacationing in Atlantic City.

For these reasons, we conclude that there was sufficient independent evidence to make it more likely than not that Levy and Gozlon-Peretz were participants with Yehuda in a conspiracy to distribute heroin. We find that independent evidence every bit as probative of a conspiracy as the independent evidence in *Gibbs*, 739 F.2d 838, and in *United States v. Leon*, 739 F.2d 885 (3d Cir.1984). Contrary to appellants' contention, we also find our conclusion entirely consistent with *United States v. Wexler*, 838 F.2d 88 (3d Cir.1988), in which the court concluded that a defendant who aided in the transportation of a truck containing illegal drugs did not have reason to know that the truck contained anything other than stolen goods. First, in this case, unlike *Wexler*, there is evidence from which one can rationally infer that the defendants were the suppliers of the drugs. Second, in *Wexler* the government had to show enough evidence to support a *conviction*, a far heavier burden than it labors under here.

B.

[2] Levy insists that the district court erred in admitting evidence of her possession of a passport issued in the name of Annette Amar and of her use of that fictitious name. Making reference to the "international traveling statutes," she characterizes this evidence as "other crimes evidence" and asserts that, even if it has some relevance, its probative value is outweighed by its potential for undue prejudice. Gozlon-Peretz makes a similar argument. We are unpersuaded.

The use of false passports and identities by the defendants is relevant for at least three reasons. First, defendant Levy's use of her "Annette Amar" alias in checking into the two hotel rooms, supports the government's contention that she was the "front person" for Gozlon-Peretz and Yehuda, protecting their identities while they completed the heroin sale. If the sale had been consummated as planned, the only direct link to Gozlon-Peretz would have been the fading memory of the Sands Hotel desk clerk. Thus, the use of the false identity could be seen as part of the defendants' plan in implementing the conspiracy, a safety measure to protect Gozlon-Peretz in case the buyer was later arrested. Second, the defendants' attempt to conceal their true identities by providing aliases to the police upon arrest is relevant as consciousness of guilt. *United States v. Kalish*, 690 F.2d 1144, 1155 (5th Cir.1982), *cert. denied*, 459 U.S. 1108, 103 S.Ct. 735, 74 L.Ed.2d 958; *see also United States v. Boyle*, 675 F.2d 430 (1st Cir.1982); *Leon*, 739 F.2d at 893 n. 19. Finally, the use of false identities by all three conspirators also tended to show joint planning and coordination by the defendants in an attempt to protect themselves from future investigation and pursuit.[2]

Federal Rule of Evidence 404(b) was not violated because the challenged evidence thus tended to show preparation, plan, and state of mind. Similarly, we conclude that Rule 403 was not breached because this evidence had significant probative value and very little, if any, potential for undue prejudice. Evidence of illegal entry into the United States is not likely " 'to suggest a decision on an improper basis, [for instance] an emotional one.' " *Weinstein's Evidence*, ¶ 403[03] (quoting the Advisory Committee's Note to Rule 403). Nor is it likely to arouse the jury's sense of horror, provoke its instinct to punish, or lead the jury to base its decision on something other than the established facts in the case. *Id.* at ¶ 403[03]. The trial judge clearly did not abuse his discretion in admitting this evidence.

C.

In evaluating Levy's and Gozlon-Peretz's argument that all the above facts, considered together, do not show that they had the requisite knowledge and intent to convict them of the crimes charged, we must decide "whether, viewing the evidence most favorably to the government, there is substantial evidence to support the verdict." *Wexler*, 838 F.2d at 90. We find that the record contains the requisite support.

[3] In Levy's case, she used a false name both to rent the hotel rooms, which were used as 'command posts,' and to mislead the police after she was arrested. She traveled to Atlantic City with Gozlon-Per-

2. Yehuda used several false names during his dealings with Maloney. At the times Yehuda called Maloney he usually identified himself as "George," when he checked into hotels in New Jersey he told Maloney to ask for "Mr. Sabag," and when he arrived in New Jersey in February of 1987 he used the name of Berthold Holly to rent room 1430 at the Sands Hotel.

etz and Yehuda, Gozlon-Peretz stayed with her in both rooms, Yehuda called the rooms she had rented during the course of the negotiations, and Gozlon-Peretz used those rooms to return Yehuda's calls. Moreover, it might also be inferred that the drugs were kept in the room she had rented at the Sands Hotel for most of the negotiating period on February 26, 1987.[3] And most importantly, Levy received a phone call from Yehuda, proposed a compromise to keep the transaction alive, and passed the proposed compromise on to Gozlon-Peretz.

This evidence supports the jury's conclusion that Levy not only had knowledge of the conspiracy but also played a significant role in bringing it to fruition.

[4] The evidence supporting Gozlon-Peretz's conviction is stronger than that supporting Levy's. Not only did he travel to Atlantic City with Levy and Yehuda, aid in engaging room 1002, occupy the "command posts" with Levy and give a false name to the police, but the jury was also entitled to infer from Yehuda's many co-conspirator statements that Gozlon-Peretz was the supplier of heroin who used Yehuda to dictate the terms of the sale.

D.

[5] We now turn to the question of whether error was committed in the sentencing of Gozlon-Peretz and Yehuda. Gozlon-Peretz was sentenced on Count Three to twenty years in prison, a Special Parole Term of five years, a "stand committed" fine of $200,000 and a $50 Special Assessment. The court also imposed concurrent twenty year terms on Counts One and Two, a Special Parole Term under Count Two, and additional Special Assessments.

On Count Three, Yehuda was sentenced to twenty years in jail, a Special Parole Term of five years, a "stand committed" fine of $200,000, and a Special Assessment of $50.

After sentence was imposed, the Assistant U.S. Attorney sought to clarify the import of Gozlon-Peretz's sentence under the new drug sentencing laws and engaged in the following exchange with the sentencing judge:

> Is it my understanding that Count 3, being the more severe count, that the defendant is also sentenced to a mandatory minimum term of ten years in prison, which he must serve without probation or parole; and that on Count 2 that there is a minimum of five years, which he must serve without probation or parole; is that correct, Judge?

Appendix at 291. To which the judge replied, "[t]hat's correct. That's correct." *Id.*

[6] The prosecutor's statement of the parole consequences of the sentence imposed was not correct. The relevant sentencing provisions, as revised in October 1986,[4] state that "[n]o person sentenced under this paragraph shall be eligible for parole during the term of imprisonment imposed therein." 21 U.S.C. § 841(b)(1)(A)(i), (b)(1)(B)(i). Thus, with respect to at least two of his twenty year sentences,[5] Gozlon-Peretz is not entitled to be considered for parole at any time.

Based upon the exchange be[illegible]n the prosecutor and the court, there [illegible] unacceptable risk that at least two of Gozlon-Peretz's current sentences are the result of a misconception concerning their legal effect. Accordingly, under *United States v. Katzin*, 824 F.2d 234, 240 (3d Cir.1987) ("sentencing on the basis of materially untrue assumptions violates due process") (citing *United States v. Tucker*, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972)); *United States v. Kerley*, 838 F.2d 932, 941 (7th Cir.1988) (remand for resentencing required when sentence may have been based on legal and factual misunderstandings), Gozlon-Peretz is entitled to have his sentences on Counts Two and Three vacated.[6] We will vacate Gozlon-Peretz's sentences and will remand for resentencing.

Yehuda's sentence, imposed on the same day as Gozlon-Peretz's, was similarly flawed.[7] We will also vacate Yehuda's sentence and remand for resentencing.

In addition, Yehuda also challenges the "stand committed" fine of $200,000 imposed on him by the district court judge in the absence of any factual findings regarding his ability to pay that fine. The judge ordered that the "defendant ... stand committed until the fine is paid or he is otherwise discharged by due p[illegible]s of law." We confess to some uncerta[illegible]y as to what the judge intended by this language. Given that the judge apparently believed Yehuda was destined to spend a minimum of ten years in prison without regard to whether the fine was paid, the reference to a discharge by due process of law may reflect an anticipation on his part that Yehuda could raise any "ability to pay" issue in a subsequent proceeding if a failure to pay the fine ever became the sole reason for his incarceration.

[7] Because of our disposition of the other sentencing issue, we find it unnecessary to decide whether the district judge's failure to make a finding regarding Yehuda's ability to pay was reversible error in this context. When the district court holds a resentencing hearing for Yehuda following remand, it will have before it a defendant who was determined at the commencement of this appeal to be unable to pay court costs. With indigency having been so established, we think it likely that the district court either will decline to impose a "stand committed" fine or will accompany

3. The drugs had to be somewhere when Yehuda met with Agent Maloney at 7:05 pm. The most probable place would be in the room that his likely suppliers had rented, especially given the permissible inference that he went to room 1002 after telling Maloney that he was going to leave the scale with "his friend" so that the friend could measure out the drugs before delivery. Yehuda only rented room 1430, where the rest of the drugs were found, at 10:55 pm.

4. The provisions of the Anti-Drug Abuse Act of 1986, Pub.L. 99-570, §§ 1002 & 1003, amending the relevant aspects of 21 U.S.C. § 841(b)(1) became effective immediately upon the signature of the President on October 27, 1986. *U.S. v. Meyers*, 847 F.2d 1408 (9th Cir.1988); U.S. Dept. of Justice, *Handbook on the Anti-Drug Abuse Act of 1986*, at ix (Crim.Div.1987).

5. It is doubtful whether Gozlon-Peretz's twenty year sentence on Count One, which alleges a conspiracy to distribute heroin in violation of 21 U.S.C. § 846, implicates the provisions of the Anti-Drug Abuse Act of 1986 prohibiting parole. See, *Handbook on the Anti-Drug Abuse Act of 1986*, at 17-20; *United States v. Jureidini*, 846 F.2d 964 (4th Cir.1988). We need not decide this issue, however, because where the sentences imposed on two of three counts are vacated and all three sentences arise from the same criminal transaction, it is appropriate to vacate the third, valid sentence, *see, United States v. Rosen*, 764 F.2d 763 (11th Cir.1985), *cert. denied*, 474 U.S. 1061, 106 S.Ct. 806, 88 L.Ed.2d 781 (1986), in order to afford the trial judge an opportunity to properly exercise his sentencing discretion, *United States v. Grayson*, 795 F.2d 278, 287 (3d Cir.1986), *cert. denied*, 481 U.S. 1018, 107 S.Ct. 1899, 95 L.Ed.2d 505 (1987) and to "reduce the possibility of disparate and irrational sentencing." *United States v. Busic*, 639 F.2d 940, 948 (3d Cir.), *cert. denied*, 452 U.S. 918, 101 S.Ct. 3055, 69 L.Ed.2d 422 (1981); *cf. United States v. Hawthorne*, 806 F.2d 493, 499-501 & n. 14 (3d Cir.1986).

6. In view of our decision on this issue we need not reach appellant Gozlon-Peretz's claim of ineffective assistance of counsel during the sentencing phase.

7. The following colloquy occurred with respect to Yehuda:

> THE COURT: ... It is adjudged on Count 3 that the defendant is hereby committed to the custody of the Attorney General of the United States or his authorized representative for a *term of 20 years* plus five years special parole, and is fined two hundred thousand dollars. The defendant is ordered to stand committed until the fine is paid or he is otherwise discharged by due process of law. Special assessment of 50 dollars is imposed.
>
> ....
>
> Asst. U.S. Atty.: Yes Judge. But first one additional inquiry. Am I given to understand that the court also has imposed a *ten year mandatory minimum*, which the statute requires in this instance?
>
> THE COURT: I have on my presentence investigation report the penalty as five years special parole.
>
> Asst. U.S. Atty.: Judge, with the amount that he pleded [sic] guilty to it was—*no, I'm talking about the mandatory minimum of the incarceration.* There is a five years [sic] mandatory special parole, but the offense to which the defendant pleaded guilty carries a ten year mandatory minimum.
>
> THE COURT: The ten year mandatory minimum takes care of that.
>
> Asst. U.S. Atty.: Does it?
>
> THE COURT: Correct, its a statutory minimum. [sic]

Appendix to Yehuda's Brief at 46-47 (emphasis added).

the imposition of such a fine with an explanation of its purpose. Clearly, that would be the preferable practice in these circumstances.[8]

IV.

Since the evidence challenged by Levy and Gozlon-Peretz was properly admitted and as there was sufficient evidence to support their convictions for the crimes charged, we will affirm their convictions. We will vacate Yehuda's and Gozlon-Peretz's sentences and remand for resentencing.[9] Levy's sentence will be affirmed.

FIRST AMERICAN SAVINGS, FA

v.

M & I BANK OF MENOMONEE FALLS

Appeal of FIRST AMERICAN SAVINGS, F.A.

No. 88-1214.

United States Court of Appeals, Third Circuit.

Argued Aug. 17, 1988.

Decided Jan. 9, 1989.

Depositary bank sued paying bank for losses incurred in connection with check which had been dishonored. The United States District Court for the Eastern District of Pennsylvania, Clarence C. Newcomer, J., 685 F.Supp. 473, entered judgment in favor of paying bank, and appeal followed. The Court of Appeals, Stapleton, Circuit Judge, held that paying bank was liable to depositary bank for failing to give notice of dishonor within time limits prescribed by federal regulations, even though it was subsequently determined that depositary

8. There is general agreement that a district court has authority to impose a "committed fine," that is a fine which will result in incarceration until payment is made. *See, e.g., Hill v. U.S. ex rel. Wampler*, 298 U.S. 460, 56 S.Ct. 760, 80 L.Ed. 1283 (1936). The purpose of such a fine, however, is to assist enforcement of the order imposing it, *e.g., Williams v. Illinois*, 399 U.S. 235, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970), a purpose that is not served by the imposition of a "committed fine" on an indigent defendant. The Court of Appeals for the Ninth Circuit, however, has held that, though an indigent defendant may not ordinarily be incarcerated for non-payment of a fine, this principle does not impair the validity of a judgment containing a committed fine if there is reason to believe that the defendant's ability to pay will be determined before the defendant is held solely on the basis of the non-payment of the fine. *United States v. Estrada de Castillo*, 549 F.2d 583 (9th Cir.1976); *United States v. Miller*, 588 F.2d 1256 (9th Cir. 1978). The argument in favor of this position sanctioning reliance on a subsequent determination of the defendant's ability to pay becomes stronger where, as here, there is a lengthy term of imprisonment in addition to the fine. Nevertheless, the likelihood of a material increase in assets during incarceration normally will not be substantial and, if there is any reason at the time of sentencing to question whether the defendant is financially responsible, we think it at least prudent for the sentencing judge to address the ability-to-pay issue before imposing a committed fine. If the court's decision is in favor of imposing such a fine, its supporting findings will be of assistance in the event the fine ultimately becomes the only basis for detaining the defendant. If the court decides against a committed fine because of the defendant's financial position or for any other reason, the possibility of a commitment to incarceration remains open, of course, if it can later be shown that the defendant has failed to pay despite an ability to do so. *See Tate v. Short*, 401 U.S. 395, 400, 91 S.Ct. 668, 671, 28 L.Ed.2d 130 (1971).

9. Given our decision to remand for resentencing, we need not reach Yehuda's Eighth Amendment argument.

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UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

THE CLERK
on 4-21-1989
WILLIAM T. WALSH, CLERK
By (Deputy Clerk)

ORIGINAL FILED
1989

UNITED STATES OF AMERICA :

vs :

MOSHE GOZLON-PERETZ :

CRIMINAL 87-00080 (03)

J U D G M E N T

The Defendant having been convicted of the offenses of Conspiracy to distribute and possess with intent to distribute Heroin(Schedule I), of distributing Heroin (Schedule I), and of possessing with intent to distribute Heroin (Schedule I); and

It having been Ordered on August 14, 1987, that on Count 3, that the defendant be imprisoned for a period of 20 years, and a special parole term of 5 years, and pay a Fine of $200,000.00, and pay a Special assessment of $50.00, and that the defendant stand committed until the fine is paid or he is otherwise discharged by due course of law; and on Count 2, the defendant be imprisoned for a period of 20 years, and special parole term of 5 years, and pay a special assessment of $50.00; and on Count 1, the defendant be imprisoned for a period of 20 years and pay a special assessment of $50.00, and that said sentences of imprisonment and special parole only on Counts 1 and 2 are to run concurrently with each other and to sentence imposed on Count 3, and the total term of imprisonment is 20 years, with 5 years of special parole term, and pay a total fine of $200,000.00 and pay a total special assessment of $150.00:

It Is, on this 14th day of April, 1989,

ORDERED that the Judgment and Commitment imposed on August 14, 1987, is hereby Vacated; and it is hereby ORDERED that on Count 3 that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for a term of Fifteen (15)Years, plus Five(5)Years Special Parole, and that he pay a Fine of $200,000.00 and pay a special assessment of $50.00; and On Count 2 that the defendant is hereby committed for imprisonment for a period of Fifteen(15)Years, plus Five(5)Years of Special Parole and that he pay a special assessment of $50.00; and that on Count 1 that the defendant is hereby committed for imprisonment for a period of Twenty(20)Years, and pay a special assessment of $50.00; and that said sentences of imprisonment and special parole only on Counts 1 and 2 are to run concurrently with each other and to that imposed on Count 3. In summary, total term of imprisonment is Twenty (20) Years, plus Five(5)Years Special Parole, Total Fine is $200,000.00, and Total Assessment is $150.00.

App. C.

IT IS FURTHER ORDERED that the Clerk deliver two certified copies of this JUDGMENT AND COMMITMENT to the United States Marshal or any other qualified officer and that a copy serve as the commitment of the defendant.

JOHN F. GERRY, CHIEF JUDGE, U. S. D.

No. 89-

IN THE UNITED STATES SUPREME COURT

October Term, 1989

MOSHE GOZLON-PERETZ

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Third Circuit

CERTIFICATE OF SERVICE WITH FILING BY MAIL

Pursuant to this Court's Rules 29.2 and 29.5(b), I certify that I am a member of the Bar of this Court, representing the petitioner. I further certify that:

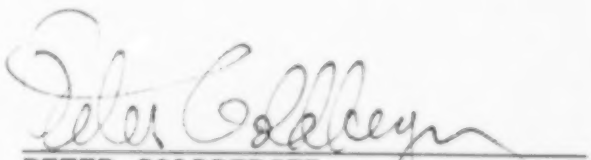
1. On April 25, 1990, within the time permitted by law for filing this Petition, I mailed the original of the Petition (together with a Motion for Leave to Proceed in Forma Pauperis), by certified mail with return receipt requested, postage prepaid, and properly addressed to the Clerk of this Court.

2. I further certify that on April 25, 1990, at the time of filing, as permitted by Rule 29.3, I served the foregoing Petition for Certiorari on counsel for the respondent United

States, the Solicitor General, whose telephone number is (202) 633-2201, by placing a copy in the U.S. Mails, certified with return receipt requested, postage prepaid, and addressed to:

Solicitor General
Department of Justice
Washington, DC 20530

As a result, I state pursuant to Rule 29.5 that all parties required to be served have been served.



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No. 89-7370

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

MOSHE GOZLON-PERETZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the district court erred in admitting statements made by petitioner's co-conspirator under Fed. R. Evid. 801(d)(2)(E) based on its determination that a preponderance of the evidence supported the existence of a conspiracy.

2. Whether the mandatory minimum terms of supervised release required by the Anti-Drug Abuse Act of 1986 became effective for offenses committed on or after the date of enactment, October 27, 1986.

3. Whether 18 U.S.C. 3013, which directs sentencing courts to impose monetary assessments on all defendants convicted of federal offenses, was enacted in violation of the Origination Clause of the Constitution.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

No. 89-7370

MOSHE GOZLON-PERETZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (en banc) resolving the hearsay question (Pet. App. B) is reported at 865 F.2d 551. The opinion of the court of appeals resolving the sentencing issues (Pet. App. A) is reported at 894 F.2d 1402.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 1990. The petition was filed April 25, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the District of New Jersey, petitioner

was convicted of conspiracy to distribute more than one kilogram of heroin (Count 1), in violation of 21 U.S.C. 846; aiding and abetting the distribution of approximately 240 grams of heroin (Count 2), in violation of 21 U.S.C. 841(a)(1); and aiding and abetting the possession of more than one kilogram of heroin with intent to distribute it (Count 3), in violation of 21 U.S.C. 841(a)(1). He was sentenced to 20 years' imprisonment on Count 1; 15 years' imprisonment and a five-year term of special parole on Count 2; and 15 years' imprisonment, a five-year term of special parole, and a $200,000 fine on Count 3. All the sentences were set to run concurrently, and the court also imposed a special assessment of $150 under 18 U.S.C. 3013. See Pet. C.A. App. at 54a. The court of appeals affirmed the convictions but remanded for resentencing to change the denomination of petitioner's five-year terms of post-confinement monitoring from "special parole" to "supervised release."

1. The facts of petitioner's offenses are described in the court of appeals opinion in United States v. Levy, 865 F.2d 551, 552-556 (3d Cir. 1989) (en banc) (Pet. App. B). Petitioner Gozlon-Peretz conspired with his co-defendants Levy and Yehuda to sell heroin to Agent Paul Maloney, an undercover DEA agent, on February 25, 1987. Prior to the actual exchange, Yehuda, who acted as the intermediary for the sale, had numerous conversations with Agent Maloney in which he referred to "his friend" (Gozlon-Peretz) and the friend's "girlfriend" (Levy) as

the sellers and his co-conspirators in the heroin sale. On the day of the sale, Yehuda, Levy, and petitioner checked into room 1002 at the Sands Hotel in Atlantic City, and Yehuda also rented another room at the Sands and a room at the Golden Nugget Hotel. 865 F.2d at 554. During one of their meetings in the Sands Hotel lobby, Agent Maloney overheard Yehuda ask the telephone operator for room 1002. Yehuda then had a conversation in a foreign language over the telephone. Id. at 555. Once the sale was made, Yehuda was arrested and room 1002, as well as room 1430, which had also been rented by Yehuda, were searched.

During the room searches and the follow-up investigation, evidence was uncovered linking Gozlon-Peretz and Levy to the heroin-sale conspiracy with Yehuda. First, it was verified that telephone calls had been placed from room 1002 to the pay phone used by Yehuda at the times Agent Maloney saw Yehuda receiving the calls. Also, a beeper was found in room 1002 with a number coinciding with the number Yehuda had called during one of his meetings with Agent Maloney. Id. at 555-556. In addition, foreign passports were discovered in room 1002 in the names of Pasquale DiStefano and Annette Amar, the names used by Gozlon-Peretz and Levy to identify themselves when they were questioned after their arrests; two Greyhound tickets were discovered in room 1002 with numbers consecutive to the number of a like ticket found on Yehuda; a bill was found in room 1002 from the Novotel in New York City, the hotel called by Yehuda to reach his friend

during an earlier meeting with Agent Maloney respecting the heroin sale; and 2,127 grams of 24 percent heroin hydrochloride were discovered in room 1430. Ibid.

2. At trial, the district court admitted Agent Maloney's hearsay testimony about Yehuda's statements incriminating petitioner as co-conspirator declarations under Fed. R. Evid. 801(d)(2)(E). In deciding whether there was sufficient evidence of a conspiracy to admit the statements, the district court applied the then-governing Third Circuit precedent, United States v. Ammar, 714 F.2d 238 (3d Cir.), cert. denied, 468 U.S. 936 (1983), which required the court to determine, based on the record evidence without reference to the purported co-conspirator statements, that it was more likely than not that those statements were made in furtherance of a then-existing conspiracy.

2. On January 9, 1989, the court of appeals affirmed petitioner's conviction but remanded for resentencing. The court expressed concern that the district court may have imposed 20-year sentences on Counts 2 and 3 based on the belief that petitioner would be eligible for parole after serving 10 years, whereas the applicable statute, 21 U.S.C. 841(b)(1)(A), provided for no parole eligibility. The court of appeals therefore vacated petitioner's sentence and remanded for resentencing.

On remand, the district court reduced the terms of imprisonment on Counts 2 and 3 from 20 to 15 years, once again to

be followed by a five-year term of special parole.

3. On appeal from that judgment, petitioner challenged the five-year term of special parole and the special assessments imposed under 18 U.S.C. 3013. Petitioner argued that the post-confinement monitoring provisions of the Anti-Drug Abuse Act of 1986 (ADAA), Pub. L. No. 99-570, tit. I, § 1002, 100 Stat. 3207-2, did not become effective until November 1, 1987, after the commission of his crime, and that he was therefore not subject to post-confinement monitoring of any sort. Petitioner further argued that the special assessment statute, 18 U.S.C. 3013 was enacted in violation of the Origination Clause of the Constitution. The court of appeals rejected both contentions, but directed the district court to designate petitioner's post-confinement monitoring as supervised release instead of special parole.

ARGUMENT

1. Petitioner claims (Pet. 24-29) that the court of appeals applied an incorrect standard to determine whether petitioner and Yehuda were members of a conspiracy so that Yehuda's incriminating statements to Agent Maloney could be admitted against petitioner under Fed. R. Evid. 801(d)(2)(E). The court of appeals correctly held that, even without reference to Yehuda's incriminating statements to the undercover agent, the evidence linking petitioner to Yehuda's heroin sale conspiracy was sufficient to support the admission of Yehuda's statements as

co-conspirator declarations. Even though, as petitioner points out, Agent Maloney was unable to understand what Yehuda was saying in a foreign language to the person in room 1002, and of course was unable to hear what Yehuda heard, it was entirely reasonable and appropriate for the district court and the court of appeals to infer from Yehuda's actions after the telephone conversations that he had been discussing the heroin sale with "his friend." And it was reasonable to infer that that friend was petitioner, since there was evidence that Yehuda was speaking to someone in room 1002, and petitioner occupied that room. In addition, there was abundant additional circumstantial evidence linking petitioner to Yehuda and to Yehuda's illegal drug activities. Thus, as the court of appeals concluded, there was unquestionably a sufficient basis to conclude that petitioner and Yehuda were co-conspirators in the heroin sale even without taking into account the co-conspirator's statements themselves.1/

Petitioner suggests (Pet. 25-29) that this Court should

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1 The court of appeals found it unnecessary to decide whether this Court's decision in Bourjaily v. United States, 483 U.S. 171 (1987), should be applied retroactively to this case. In Bourjaily, the Court held that the contents of a co-conspirator's statements may be considered in determining whether the evidence is sufficient to admit the statements. The court of appeals found that the co-conspirator's statements were admissible even under the more restrictive standard the court had applied before Bourjaily. In any event, there is no reason why Bourjaily should not be applied retroactively, since the Court in that case was simply construing a rule of evidence in existence at the time of petitioner's trial.

grant certiorari to resolve a disagreement among the circuits on the question whether the admission of the co-conspirator's statements must be supported by evidence tending to demonstrate the existence of the charged conspiracy, a criminal conspiracy, or merely a joint undertaking. However, this case does not present that issue for resolution. It is clear that the court of appeals understood the district court to have found the evidence sufficient to demonstrate by a preponderance that the charged criminal conspiracy existed. See 865 F.2d at 553, 556-558. The court thus affirmed the admissibility of the evidence under the most stringent standard.

2. We believe that the court of appeals was correct to rule that the penalty provisions of the ADAA went into effect on the October 26, 1987, date of enactment, and to affirm petitioner's term of supervised release imposed under applicable provisions of the ADAA. We also agree with petitioner, however, that the Court should grant the petition in this case to resolve the conflict among the circuits respecting the effective date of the provisions mandating minimum terms of post-confinement monitoring in the form of supervised release under the ADAA.

a. By the plain terms of Section 1002 of the ADAA, which revised the penalty provisions governing petitioner's offense, it was proper for the district court to include in petitioner's sentence a term of five years' supervised release. Section 1002 did not expressly provide for an effective date, and the courts

of appeals are in conflict respecting the effective date of the ADAA's post-confinement monitoring provisions. The confusion has been caused by differing interpretations of a separate ADAA provision, Section 1004, which provides that, on November 1, 1987, the term "supervised release" shall be substituted for the term "special parole" wherever the latter term appears in the provisions in effect at that time.2/ The effective date of that change was also the effective date of 18 U.S.C. 3583, the provision of the Sentencing Reform Act of 1984 that implemented the new concept of supervised release. See Pub. L. No. 99-570, § 1004(b), 100 Stat. 3207-6 (1986). However, Section 1004 does not refer to, or delay the effectiv- date of, any other provision.

b. Three circuits have ruled that the ADAA's post-confinement monitoring provisions became effective immediately upon the enactment of the ADAA, October 27, 1986. Three other circuits have ruled that the post-confinement monitoring provisions became effective on November 1, 1987, and therefore are applicable only to offenses committed after that date. Several other courts of appeals have addressed this question with more ambiguous results.

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2 Because the ADAA did not effect revisions in all of the existing drug-penalty provisions, after the enactment of the ADAA there remained provisions calling for "special parole" even though the ADAA employed only the terminology "supervised release" in its penalty provisions. Compare 21 U.S.C. 841(b)(1)(A)-(C), 845a(b), 845b(b) and 845b(c), 960(b)(1)-(3) (Supp. IV 1986) (supervised release) with 21 U.S.C. 841(b)(1)(D), 841(b)(2), 845(a), 845(b), 845a(a) and 960(b)(4) (Supp. IV 1986)(special parole), and 21 U.S.C. 962(a) (1982) (same).

The Third, Ninth, and District of Columbia Circuits have held that the ADAA's provisions requiring supervised release became effective immediately upon enactment, October 27, 1986, and apply to offenses committed on or after that date. United States v. Gozlon-Peretz, 894 F.2d 1402 (3d Cir. 1990), cert. pending, No. 89-7370; United States v. Torres, 880 F.2d 113 (9th Cir. 1989), cert. denied, 110 S. Ct. 873 (1990); United States v. Brundage, No. 89-3068 (D.C. Cir. May 18, 1990). In Gozlon-Peretz and Torres, the courts of appeals upheld a sentence of a five-year term of supervised release imposed under 21 U.S.C. 841(b)(1)(A) (Supp. IV 1986), whereas in Brundage, the court upheld a four-year term of supervised release under 21 U.S.C. 841(b)(1)(B) (Supp. IV 1986). All three cases involved offenses for which the pre-ADAA sentencing provisions did not provide for any term of post-confinement monitoring. See 21 U.S.C. 841(b)(1)(A) (Supp. II 1984). These courts applied the plain meaning of the statute, with respect to both the duration and the terminology of post-confinement monitoring. In our view, the Third, Ninth, and D.C. Circuits have correctly construed the statute.3/

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3 Unlike Section 1004, which provided for the elimination of all references to special parole terms in the Controlled Substances Act as of November 1, 1987, Section 1002 of the ADAA did not include any specific reference to its effective date. In the absence of any provision postponing the effective date of that Section, it took effect immediately. Arnold v. United States, 9 Cranch 103, 119 (1815); United States v. Shafer, 789 F.2d 682, 686 (9th Cir. 1986). The reference in Section 1004 to a delayed effective date for the changes made "by this section"

On the other hand, the Fourth, Seventh, and Tenth Circuits have ruled that the ADAA's post-confinement monitoring provisions apply only to offenses committed after November 1, 1987. United States v. Levario, 877 F.2d 1483 (10th Cir. 1989); United States v. Whitehead, 849 F.2d 849 (4th Cir.), cert. denied, 109 S. Ct. 534 (1988); United States v. Duprey, 895 F.2d 303 (7th Cir. 1989), cert. denied, No. 89-6512 (Apr. 23, 1990). In Whitehead, the Fourth Circuit vacated four-year terms of supervised release imposed under 21 U.S.C. 841(b)(1)(B) and 960(b)(2) (Supp. IV 1986). The court accepted the same arguments pressed by petitioner here, and concluded that the ADAA's post-confinement monitoring provisions became effective on November 1, 1987, after the date of the defendants' offenses. The court remanded for resentencing under the pre-existing penalty provisions, which provided for shorter mandatory minimum terms of

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plainly did not delay the effective date of a different section, Section 1002. See Gov't Br. in Opp. at 6 in United States v. Torres, 880 F.2d 113 (9th Cir. 1989), cert. denied, 110 S. Ct. 873 (Jan. 22, 1990); Gov't Br. in Opp. at 4 in United States v. Villasenor, 884 F.2d 1496 (9th Cir. 1989), cert. denied, No. 89-6434 (Apr. 16, 1990).

Moreover, as discussed in our Brief in Opposition at 8-9 in Torres, supra, the legislative history of the 1986 Act reveals that Congress intended for some kind of post-confinement monitoring to go into effect immediately under the revised Section 841(b), and to be applicable to all persons subject to sentencing under that statute. The plain terms of the substantive provisions in the ADAA governing post-confinement monitoring refer to supervised release, and there is no reason to read these provisions as imposing the type of post-confinement monitoring--special parole--that was available under pre-existing law.

post-confinement monitoring--three rather than four years--in the form of special parole.[4] See also United States v. Duprey, 895 F.2d at 310-311 (remand for sentencing under pre-ADAA provision providing for shorter mandatory minimum term of post-confinement monitoring in the form of special parole). In Levario, the court of appeals for the Tenth Circuit vacated a five-year term of supervised release imposed under the ADAA, 21 U.S.C. 841(b)(1)(A) (Supp. IV 1986), also based on the conclusion that the post-confinement monitoring provisions of the ADAA did not become effective until November 1, 1987. That ruling had the effect of omitting any period of post-confinement monitoring, because the pre-existing statute did not provide for any term of post-confinement monitoring for the defendant's offense. See 21 U.S.C. 841(b)(1)(A) (Supp. II 1984).[5]

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[4] In Whitehead, the court remanded for resentencing under the penalty provisions of 21 U.S.C. 841(b) and 960(b) (1982)--that is, the provisions in effect in 1982, before the 1984 enactment of the predecessor provisions to the ADAA. The reasoning in Whitehead, however, supported a remand for resentencing under the 1984 penalty provisions, 21 U.S.C. 841(b)(1)(B) and 960(b)(2) (Supp. II 1984).

[5] At least two circuits (the Fifth and Eleventh) have followed an approach that appears, at first impression, to accord with the Fourth and Tenth Circuit views, but on closer inspection is unclear. These circuits (the Fifth and Eleventh) adopted the position of the Fifth Circuit in United States v. Byrd, 837 F.2d 179, 181 n.8 (5th Cir. 1988), which was the first court of appeals to consider the issue of the effective date of the penalty provisions under the ADAA. The Byrd court concluded that Congress did not intend the ADAA's provisions for supervised release to become effective until November 1, 1987. However, the offense at issue in Byrd was one for which both the post- and pre-ADAA penalty provisions required a minimum sentence of post-confinement monitoring of the same duration--three-years.

The First Circuit follows yet another approach. In opinions in two different cases, the First Circuit has affirmed a sentence of supervised release under 21 U.S.C. 841(b)(1)(A) (Supp. IV 1986) and a sentence of special parole under 21 U.S.C. 841(b)(1)(C) (Supp. IV 1986), for offenses committed during the pertinent period, even though the applicable penalty provisions

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Compare 21 U.S.C. 841(b)(1)(C) and 845a(a) (Supp. IV 1986) with 21 U.S.C. 841(b)(1)(B) and 845a(a) (Supp. II 1984). The only issue directly decided was whether post-confinement monitoring should be in the form of "special parole" or "supervised release," not whether the delayed effective date of the ADAA provisions applied to the length of post-confinement monitoring as well.

Many courts of appeals, including the Fourth and Tenth Circuits in cases cited above, have invoked Byrd for the broad proposition that the post-confinement monitoring provisions of the ADAA did not become effective until November 1, 1987, without explicitly distinguishing between terminology and duration of sentence. However, the Eleventh Circuit applied that principle in a subsequent case where, as in Byrd, the duration of the applicable post-confinement sentence was the same under the ADAA and its predecessor, thus obviating the need to address whether the delayed effective date applied to duration as well as terminology. See United States v. Smith, 840 F.2d 886 (11th Cir.), cert. denied, 109 S. Ct. 154 (1988)(sentencing provision provided for three year term under old and new law).

The First Circuit has explicitly separated the issue of duration and type of monitoring in United States v. Ferryman, No. 89-1486 (Feb. 21, 1990). In that case the court decided that, with regard to an offense for which the penalty provision of the predecessor to the ADAA prescribed a minimum term of special parole of the same duration as the term of supervised release required under the ADAA, the correct form of post-confinement monitoring was special parole. In denying the government's petition for rehearing for clarification of the ruling, the court stated that "the issue of the length of mandatory minimum terms of post-confinement monitoring for drug related offenses committed during the hiatus period" (emphasis added) had neither been raised below nor presented to the court of appeals, and that the panel opinion should therefore not "be read as intimating any view on that issue."

of the ADAA provided for a term of supervised release for both offenses. In United States v. Ferryman, No. 89-1486, slip op. at 12-13 (1st Cir. Feb. 21, 1990), the court reasoned that an offense that would have been punishable by special parole had it been committed prior to enactment of the ADAA should continue to be punishable by post-confinement monitoring in the form of special parole if it was committed before November 1, 1987.[6] In United States v. Figueroa, No. 89-1745, slip op. at 6-8 (1st Cir. Mar. 21, 1990), the court concluded that an offense that would not have been punishable by any type of post-confinement monitoring had it been committed prior to the enactment of the ADAA should be punishable by supervised release if it were committed after October 27, 1986, because Congress clearly intended that some form of post-confinement monitoring apply, and only the ADAA provided for such monitoring.[7]

c. This Court should resolve the conflict that has developed among the circuits respecting the effective date of the ADAA's post-confinement monitoring provisions. Although this issue only affects sentences for drug offenses committed between

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[6] The court did not address the question of whether the pre-ADAA penalty provisions governed the duration of special parole for this category of offenses. See note 5, supra.

[7] The categories of drug offenses under the pre- and post-ADAA law do not overlap precisely. The reasoning of the First Circuit results in offenders sentenced under the same ADAA penalty provision receiving different types of post-confinement monitoring, depending on which pre-ADAA category covered their offense.

October 27, 1986, and November 1, 1987, many thousands of cases fall into this category.[8] The conflict among the circuits has produced a large number of Rule 35 and Section 2255 motions by offenders seeking modification of the portion of their sentences dealing with post-confinement monitoring. Because of the number of cases affected and the now-established conflict among the

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8 Jurisdiction over a defendant sentenced to supervised release remains with the district court, which imposes the conditions of post-confinement monitoring and presides over revocation proceedings. Special parole, on the other hand, is administered by the Parole Commission. Compare 18 U.S.C. 3583 and 18 U.S.C. 4201-4218. Therefore, as long as the circuit split persists, there is a potential for litigation by prisoners transferred from a supervised release jurisdiction to one where special parole applies. As the Third Circuit in Gozlon-Peretz, 894 F.2d at 1406 n.6, explained, "the defendant can claim that the Parole Commission has jurisdiction and that the Commission's reparole guidelines should apply." In addition, "a defendant in such a situation could also claim that he is entitled to early termination of parole pursuant to 18 U.S.C. 4211(c), a provision that has no parallel for supervised release." 894 F.2d at 1406 n.6.

There is another difference between supervised release and special parole that could give rise to additional litigation. Although a violation of both special parole and supervised release may subject the offender to revocation and reincarceration for the entire original term of post-confinement monitoring without any credit for time spent complying with its conditions, see 18 U.S.C. 3583(e)(3) (Supp. IV 1986) (supervised release) and 21 U.S.C. 841(c) (Supp. IV 1986) (special parole), the district court has authority, not possessed by the Parole Commission, to extend the term of supervised release as one of the remedies for a violation, see 18 U.S.C. 3583(e)(2) (Supp. IV. 1986). An offender sentenced to special parole who violates the terms of his release and faces re-incarceration could conceivably complain that he should be entitled, like those subject to supervised release, to consideration of the option of extension of his term of monitoring as a penalty for violation.

circuits, a definitive ruling by this Court is needed.[9]

This case is a suitable vehicle for resolving the conflict among the circuits on the post-confinement monitoring issue. Unlike in some cases raising the issue, the outcome of the case will clearly and substantially affect petitioner. If his theory of the case is correct, he will be subject to no post-confinement monitoring at all, while he is now subject to a five-year term of supervised release. Furthermore, the issue is well defined in this case by a court of appeals opinion that discusses the competing views and statutory arguments in detail. We therefore urge that the Court grant the petition with respect to Question 2, the post-confinement monitoring issue.

3. Finally, petitioner maintains (Pet. 29) that the special assessment statute, 18 U.S.C. 3031, is unconstitutional and that

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9 This issue has been raised twice previously this Term in petitions for certiorari. In Torres v. United States, cert. denied, 110 S. Ct. 873 (Jan. 22, 1990), we opposed this Court's review in the hope that other courts of appeals might reassess their positions in light of this ruling, which we believed to be correct, and because there was no compelling need immediately to address the terms of post-confinement release in light of the substantial mandatory minimum terms of imprisonment required under the drug laws. Our subsequent decision to oppose review in another Ninth Circuit case that followed the holding in Torres, see Gov't Br. in Opp. in United States v. Villasenor, cert. denied, No. 89-6434 (Apr. 16, 1990), was buttressed by the Third Circuit's January 1990 decision in Gozlon-Peretz, supra, which supported our hope for a satisfactory resolution without this Court's intervention. However, the First Circuit's opinions in Ferryman and Figueroa, which appeared, respectively, shortly before and after our filing in Villasenor, have satisfied us that the courts are moving in the direction of even greater confusion on this issue, and that it is unrealistic to expect that the conflict among the circuits will resolve itself without this Court's intervention.

he therefore should not have to pay the special assessments imposed in this case. That issue has recently been resolved against petitioner by this Court in United States v. Munoz-Flores, No. 88-1932 (decided May 21, 1990).

CONCLUSION

The petition for a writ of certiorari should be granted, limited to the ADAA post-confinement monitoring question (Question 2).

Respectfully submitted.

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MAY 1990

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

MOSHE GOZLON-PERETZ, PETITIONER

vs. No. 89-7370

UNITED STATES OF AMERICA

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the BRIEF FOR THE UNITED STATES by mail on May 23, 1990.

PETER GOLDBERGER
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May 23, 1990

Kenneth W. Starr
KENNETH W. STARR
SOLICITOR GENERAL

No. 89-7370

In The

Supreme Court of the United States

October Term, 1990

MOSHE GOZLON-PERETZ,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

JOINT APPENDIX

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Petition For Certiorari Filed April 25, 1990
Certiorari Granted June 18, 1990

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RELEVANT DOCKET ENTRIES

CRIMINAL DOCKET • U.S. District Court

U.S.

vs.

DiSTEFANO, PASQUALE
MOSHE GOZLON-PERETZ
a/k/a "Pasquale DiStefano"

Case Filed 03-05-87

Docket No. 87-80-01

No. of Def.'s 3

Felony [X]

CHARGES:

U.S. Title/Section	Offenses Charged	Original Counts
21:846	Conspiracy to distr. and possess w/intent to distr. a substance containing heroin (Schedule I) (21:841(a)(1)) Ct. 1	1
21:841(a)(1) & 18:2	Possess w/intent to distr. a substance containing heroin (Schedule I) Ct. 2	1
21:841(a)(1) & 18:2	Distribute a subsance containing heroin (Schedule I) Ct. 3	1

Date of Offense: 2-26-87

DISPOSITION DATE 5-21-87

SENTENCE DATE 8-14-87

DATE	Doc. No.	PROCEEDINGS
3-9-87	9.	INDICTMENT FILED 3-5-87
4-10-87		*ELLUS YEHUDA – PLEA – NOT GUILTY* *ANNETTE AMAR – PLEA – NOT GUILTY* *PASQUALE DiSTEFANO – PLEA – NOT GUILTY* Ordered Defendants held without bail and remanded to M.C.C. Ordered Trial date fixed for May 18, 1987
5-13-87	17.	*ALL DEFENDANTS* – SUPERSEDING INDICTMENT filed.
5-18-87	18.	*MOSHE GOZLON-PERETZ and YAFFA LEVY* – Minutes of 5/18/87. *PLEAS TO SUPERSEDING INDICTMENT – NOT GUILTY* TRIAL MOVED BEFORE THE COURT & JURY.
5-18-87	19.	*ELLUS YEHUDA* – Minutes of 5/18/87 filed. Defendant Sworn. *PLEA TO SUPERSEDING INDICTMENT –* *COUNTS 1 & 2 – NOT GUILTY* *COUNT 3 – GUILTY* Ordered remanded to M.C.C. without bail
5-21-87	25.	*MOSHE GOZLON-PERETZ and YAFFA LEVY –* *VERDICT–* MOSHE GOZLON-PERETZ – Count 1 – Guilty Count 2 – Guilty Count 3 – Guilty

		YAFFA LEVY – Count 1 – Guilty Count 2 – Guilty Count 3 – Guilty Ordered Verdict filed. Sentence Date – 7/10/87 – 10:30 AM
8-14-87	28.	*ELLUS YEHUDA* – Minutes of 8/14/87 filed. SENTENCE – On Superseding Indictment – Count 3 20 years impr. and a special parole term of 5 years, and pay a special assessment of $50.00 Fine – $200,000.00. The defendant to stand committed until said fine is paid or he is otherwise discharged by due course of law. On motion of government – Ordered Counts 1 & 2 of Superseding Indictment and Original Indictment dismissed.
8-17-87	30.	*ELLUS YEHUDA* – Judgment and Commitment/Probation Order filed 8/14/87. (Gerry) n/m
8-17-87	31.	*YAFFA LEVY* – Minutes of 8/14/87 filed 8/14/87. SENTENCE – On Superseding Indictment On Count 3 – 10 yrs. impr. and Special Parole term of 5 years, and pay special assessment of $50.00 On Count 2 – impr. for 5 yrs. Special Parole term of 3 years, and pay a special assessment of $50.00. On Count 1 – Impr. for 10 years and pay a special assessment of $50.00 Further Ordered that the said sentences on Counts 1 & 2 are to run concurrently with each other and to sentence imposed on Count 3. In summary, total term of

imprisonment is 10 years, plus 5 years of special parole and a total special assessment of $150.00

8-17-87 33. *YAFFA LEVY* – Judgment and probation/Commitment Order filed 8/14/87. (Gerry) n/m

8-17-87 34. *MOSHE GOZLON-PEREZ* (sic) – Minutes of 8/14/87 filed 8/14/87. SENTENCE – On Superseding Indictment On Count 3 – 20 years impr. and a special parole term of 5 years, pay a Fine of $200,000.00, and pay a special assessment of $50.00, and that the defendant stand committed until the fine is paid or he is otherwise discharged by due course of law. On Count 2 – Imprisonment for 20 years, and a special parole term of 5 years, and pay a special assessment of $50.00. On Count 1 – Impr. for 20 years and pay a special assessment of $50.00. It is further Ordered that said sentences of imprisonment and special parole only on Counts 1 and 2 are to run concurrently with each other and to sentence imposed on Count 3. In Summary total term of imprisonment is 20 years, 5 years Special Parole Term Total Fine – $200,000.00 Total special assessment – $150.00

8-17-87 36. *MOSHE GOZLON-PEREZ* (sic) – Judgment and Probation/Commitment filed 8/14/87. (Gerry) n/m

8-21-87 37. *YAFFA LEVY* – Notice of appeal of defendant filed 8/21/87 at 2:30 P.M.

8-21-87 38. *MOSHE GOZLON-PEREZ* (sic) – Notice of appeal of defendant filed 8/21/87 at 2:30 P.M.

8-26-87 39. *ELLUS YEHUDA* – Notice of appeal of defendant filed 8/19/87

1-17-89 59. *ALL DEFENDANTS* – Opinion USCA filed.

2-2-89 63. *MOSHE GOZLON-PERETZ* – Certified copy of Judgment of USCA issued in lieu of a formal mandate on January 31, 1989 affirming the judgments of USDC entered August 17, 1987, in accordance with the opinion of the Court filed. (affirmed insofar as the conviction and vacated insofar as sentence and the case remanded to USDC for resentencing)

3-22-89 66. *ELLUS YEHUDA* – Withdrawal of guilty plea filed.

3-30-89 67. *MOSHE GOZLON-PERETZ* – Order appointing counsel, CJA (for resentencing) filed. (Gerry)

4-14-89 68. *ELLUS YEHUDA* – Minutes of 4/14/89 filed. Ordered sentence of 8/14/87 vacated. Original Plea of guilty withdrawn.

1-14-89 69. *MOSHE GOZLON-PERETZ* – Minutes of 4/14/89 filed. Ordered sentence of 8/14/87 vacated. *RE-SENTENCE* ON 3 COUNTS OF SUPERSEDING INDICTMENT COUNT 3 – 15 years, and 5 years Special Parole Term & fine – $200,000.00 & special assessment of $50.00

COUNT 2 – 15 years, and 5 years Special Parole Special assessment – $50.00
COUNT 1 – 20 years and special assessment of $50.00
Sentence on Count 1 and Count 2 to run concurrent with sentence imposed on Count 3 –
Total sentence – 20 years and fine of $200,000.00 $150.00 special assessment and 5 years special parole (Gerry)

4-19-89 72. *MOSHE GOZLON-PERETZ* – Notice of Appeal of defendant filed 4/19/89 at 11:52 AM

4-21-89 74. *MOSHE GOZLON-PERETZ* – JUDGMENT filed 4/20/89 (Gerry) n/m (CERTIFIED COPY TO USCA)

5-26-89 *MOSHE GOZLON-PERETZ* – RECORD COMPLETE FOR PURPOSES OF APPEAL (SENT TO USCA)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
CLOSED

Case Closed JAN 31 198[illegible]
DOCKET No. 87-5596
Rehearing In Banc 11-7-88
Related Cases 87-5595; 87-5613
CALENDARED FOR: ~~6-15-88~~

ORIGIN: NJ – Camden
DC DOCKET NO. Criminal 87-00080-03
DC JUDGE John F. Gerry
FILED IN DC 3-5-87
NOA FILED 8-21-87
CASE TYPE CR – Consp. to distr. & poss. w/ intent to distr. a sub. contg. heroin

DOCKETED: 8-26-87
[X] Fee Paid [ ] IFP [X] CJA [ ] USA

TITLE OF CASE	APPEARANCES
UNITED STATES OF AMERICA vs. MOSHE GOZLON-PERETZ, a/k/a "Pasquale DiStefano", Appellant	APPELLANT/PETITIONER: ~~Charles F. Garnesi 10-19-87~~ ~~Charles F. Garnesi, Esq.~~ ~~186 Joralemon Street~~ ~~Brooklyn, NY 11201~~ ~~(718) 855-6646~~ ~~[Appellant, Moshe Gozlon-Perez~~ (sic)] ~~[CT. APTD. CRIM. 1-22-88]~~ **WITHDRAWN** – See 2-19-88 Clerk Order NOW HAS RETAINED COUNSEL

"CONTD."

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SUMMARY OF EVENTS
*ARGUED/~~SUBMITTED~~ 6/15/88 – SEE PG. 2
PANEL Mansmann, Scirica & Cowen, C.J.
*REARGUED IN BANC 11/7/88 – SEE PG. 3
OPINION 1/9/89 cv. 87-5595/6 & 5613
[ ] Mem. Op. [X] Signed [ ] P.C.N./P or Pub.
MO Stapleton CO ___ DO ___
JUDGMENT – Affirming in No. 87-5595. Affirming, etc. Vacating & Remanding in 87-5596. Affirming, etc. Vacating, etc & Remanding in No. 87-5613.
*MANDATE ISSUED JAN 31 1989
Reported at 865 F2d 551

DATE	FILINGS – PROCEEDINGS
1987	
Nov. 30	Order in No. 87-5595 (Clerk) that the appeals docketed at Nos. 87-5595, 87-5596 & 87-5613 are consolidated for purpose of disposition & if the parties so choose for purposes of filing briefs & single jt apx; the briefing schedules entered in appeal Nos. 87-5595 & 87-5596 are vacated & a new briefing schedule covering all 3 appeals will be entered after the questions of representation in appeal Nos. 87-5595 & 87-5596 are resolved, filed. (11)
1988	
Feb. 19	Order (Clerk) granting above mot, appearance of Peter J. (sic) Goldberger, Esq., is substituted, filed. (adl)
June 15	At oral argmt. cnsl. for appee. to file supp. letter within 24 hrs. re: appendix citation to Gozlon-Perez (sic) and a red bag. (87-5595/96) (ab)
June 16	Letter dated 6-15-88 from aplee rec'd. at direction of Ct. (adl) (Cvs 5595/6, 5613)
June 16	Letter dated 6-16-88 from aplt in 87-5596 rec'd. at direction of Ct. (adl) (Cvs 5595/6, 5613)
Jul 28	Order *Seitz*, Higginbotham, Sloviter, Becker, Stapleton, Mansmann, Greenberg, Hutchinson, Scirica and Cowen, CJS)

Granting Rehearing before the Court in banc. The Clerk shall list the case for rehearing before the court in banc at the convenience of the Court, filed. Cvs. 87-5595, 87-5596 & 87-5613.

Sept. 15 — Order (*Seitz*, J.) granting Motion of Applt. for leave to file supp. briefs; Counsel will be advised by letter as to matters Court wishes to have addressed, filed. (mef) (No. 87-5596).

Sept. 15 — Clerk's letter to counsel directing counsel to file supp. briefs by addressing certain issues raised by Court and Applts' briefs to be filed on or before Sept. 29, 1988; Government's brief on or before Oct. 14, 1988; Counsel will be granted 20 minutes for oral argument. (Covers 87-5595/6) (mef)

Oct. 31 — Order (*Seitz*, Higginbotham, Sloviter, Becker, Stapleton, Mansmann, Greenberg, Hutchinson, Scirica and Cowen, C.J.) granting aplt's motion for leave to file reply to supplemental brief for aplee, filed. (11)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
CLOSED

Case Closed FEB 16 1990
DOCKET No. 89-5330
CALENDARED FOR: 10-17-89

ORIGIN: NEW JERSEY (Camden)
DC DOCKET NO. Criminal 87-00080-03
DC JUDGE John F. Gerry
FILED IN DC 3-5-87

NOA FILED 4-20-89
CASE TYPE Criminal – Code P

DOCKETED: 4-27-89
[ ] Fee Paid [ ] IFP [X] CJA [ ] USA

TITLE OF CASE	APPEARANCES
UNITED STATES OF AMERICA vs. MOSHE GOZLON-PERETZ, Appellant	APPELLANT/ PETITIONER: XXXXXXXXXXXXXXX XXXXXXXXXXXXXXX XXXXXXXXXXXXXXX XXXXXXXXXX [Ct.-Aptd.-Criminal-4/27/89] OVER-
	APPELLEE/ RESPONDENT: Michael V. Gilberti, Esq. – 7-27-89 Edna Ball Axelrod, Esq. – 5-4-89 Chief, Appeals Division U.S. Attorney's Office 970 Broad Street, Room 502 Newark, NJ 07102 (201) 621-2755/FTS 348-2755 (201) 621-2737 (Gilberti)

SUMMARY OF EVENTS
~~ARGUED~~/SUBMITTED 10/17/89
PANEL Becker, Cowen & Seitz, CJ
OPINION 1/25/90
[ ] Mem. Op. [X] Signed [ ] P.C. N./P or Pub.

MO Becker (ch) CO ___ DO ___
JUDGMENT vacating insofar as the jdmt of sentence & the cause remanded to D.C. w/direction to impose a term of supervised release in lieu of a term of special parole. Further ordered that the judgment is affirmed in all other respects.
MANDATE ISSUED FEB 16 1990

DATE	FILINGS – PROCEEDINGS
1989	
July 3	Letter dtd 7-3-89 from aplt rec'd for info of Ct. (dr)
Aug. 21	Letter dtd 8-14-89 from aplee rec'd for info of Ct. (dr)
Aug. 28	Order (*Becker*, Cown (sic) & Sietz (sic), C.j.) granting motion by aplt for leave to file supplemental brief, filed. (dr)
Sept. 28	Clk's ltr to cnsl directing them to submit ltr mem in quad no later than Oct. 10, 1989 as to whether they intend to adhere to certain provisions (sic) of the Anti-Drug Abuse Act of 1986 (af) (Cvs. 89-3461 & 89-5330)
Oct. 10	Letter dtd 10-5-89 from aplee in 89-3461 rec'd at dir. of Ct. (dr) (Cvs. 89-3461 & 89-533)
Oct. 10	Letter dtd 10-6-89 from aplee in 89-5330 rec'd at dir. of Ct. (dr) (Cvs. 89-3461 & 89-5330)
1990	
Feb. 6	Order (*Becker*, Cowen & Seitz, CJS) Amending the slip opinion, filed. (ch)

Apr 10	Order (Becker, CJ) granting motion by Pamela A. Wilk, court-appointed counsel, for leave to withdraw, and for substitution by Peter Goldberger as new counsel, filed (dh)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA	:	Hon. John F. Gerry
	:	
v.	:	Crim. No. 87-80
	:	
MOSHE GOZLON-PERETZ a/k/a "Pasquale DiStefano," and YAFFA LEVY a/k/a "Annette Amar"	:	[Superseding Indictment]
	:	
	:	21 U.S.C. §§ 846 and 841(a)(1), and 18 U.S.C. § 2

The Grand Jury in and for the District of New Jersey charges that:

COUNT 1

1. From at least in or about February, 1986 until on or about February 26, 1987, at Atlantic City in the District of New Jersey and elsewhere, the defendants

MOSHE GOZLON-PERETZ
a/k/a "Pasquala DiStefano," and
YAFFA LEVY a/k/a "Annette Amar"

did knowingly and intentionally confederate, conspire, combine and agree among themselves and with others, known and unknown to the Grand Jury, to distribute and to possess with intent to distribute more than a kilogram of heroin, a Schedule I narcotic drug controlled substance, contrary to the provisions of Title 21, United States Code, Section 841(a) (1) (as amended October 27, 1986).

2. It was a part of the conspiracy that the defendants and others would obtain quantities of heroin ranging from 240 grams to at least 2 kilograms for resale.

3. It was also a part of the conspiracy that the defendants and others would find customers for the heroin and would sell it.

4. It was also a part of the conspiracy that the defendants and others would use communications facilities, such as public pay telephones and digital beepers to run their operation and to conceal their dealings.

5. It was also a part of the conspiracy that the defendants and others would use false names and documentation, such as passports to conceal their identities.

In violation of Title 21, United States Code, Section 846.

COUNT 2

On or about February 26, 1987, at Atlantic City in the District of New Jersey and elsewhere, the defendants

MOSHE GOZLON-PERETZ
a/k/a "Pasquale DiStefano," and
YAFFA LEVY a/k/a "Annette Amar"

did knowingly and intentionally distribute at least 240 grams of heroin, a Schedule I narcotic drug controlled substance.

In violation of Title 21, United States Code, Section 841(a) (1) (as amended October 27, 1986), and Title 18, United States Code, Section 2.

COUNT 3

On or about February 26, 1987, at Atlantic City in the District of New Jersey and elsewhere, the defendants

MOSHE GOZLON-PERETZ
a/k/a "Pasquala DiStefano," and
YAFFA LEVY a/k/a "Annette Amar"

did knowingly and intentionally possess with intent to distribute approximately two kilograms of heroin, a Schedule I narcotic drug controlled substance.

In violation of Title 21, United States Code, Section 841(a) (1) (as amended October 27, 1986), and Title 18, United States Code, Section 2.

FOREPERSON

SAMUEL A. ALITO, JR.
United States Attorney

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA	:	CRIMINAL 87-00080 (03)
vs	:	JUDGMENT
MOSHE GOZLON-PERETZ	:	ORIGINAL FILED APR ILLEGIBLE 1989 ILLEGIBLE

The Defendant having been convicted of the offenses of Conspiracy to distribute and possess with intent to distribute Heroin (Schedule I), of distributing Heroin (Schedule I), and of possessing with intent to distribute Heroin (Schedule I); and

It having been Ordered on August 14, 1987, that on Count 3, that the defendant be imprisoned for a period of 20 years, and a special parole term of 5 years, and pay a Fine of $200,000.00, and pay a Special assessment of $50.00, and that the defendant stand committed until the fine is paid or he is otherwise discharged by due course of law; and on Count 2, the defendant be imprisoned for a period of 20 years, and special parole term of 5 years, and pay a special assessment of $50.00; and on Count 1, the defendant be imprisoned for a period of 20 years and pay a special assessment of $50.00, and that said sentences of imprisonment and special parole only on Counts 1 and 2 are to run concurrently with each other and to sentence imposed on Count 3, and the total term of imprisonment is 20 years, with 5 years of special parole term, and pay a total fine of $200,000.00 and pay a total special assessment of $150.00;

It Is, on this 14th day of April, 1989,

ORDERED that the Judgment and Commitment imposed on August 14, 1987, is hereby Vacated; and it is hereby ORDERED that on Count 3 that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for a term of Fifteen (15) Years, plus Five (5) Years Special Parole, and that he pay a Fine of $200,000.00 and pay a special assessment of $50.00; and On Count 2 that the defendant is hereby committed for imprisonment for a period of Fifteen (15) Years, plus Five (5) Years of Special Parole and that he pay a special assessment of $50.00; and that on Count 1 that the defendant is hereby committed for imprisonment for a period of Twenty (20) years, and pay a special assessment of $50.00; and that said sentences of imprisonment and special parole only on Counts 1 and 2 are to run concurrently with each other and to that imposed on Count 3. In summary, total term of imprisonment is Twenty (20) Years, plus Five (5) Years Special Parole, Total Fine is $200,000.00, and Total Assessment is $150.00.

IT IS FURTHER ORDERED that the Clerk deliver two certified copies of this JUDGMENT AND COMMITMENT to the United States Marshal or any other qualified officer and that a copy serve as the commitment of the defendant.

/s/ John F. Gerry
JOHN F. GERRY,
CHIEF JUDGE, U. S. D.

United States Court of Appeals,
Third Circuit.

UNITED STATES of America

v.

Yaffa LEVY, a/k/a "Annette Amar",
Appellant in No. 87-5595,

UNITED STATES of America,

v.

Moshe GOZLON-PERETZ, a/k/a
"Pasquale DiStefano", Appellant
in No. 87-5596,

UNITED STATES of America,

v.

YEHUDA, Ellus, a/k/a "Holly Berthold"
Appellant in No. 87-5613.

Nos. 87-5595, 87-5596 and 87-5613.

Argued June 15, 1988.

Nos. 87-5595 and 87-5596
Reargued En Banc Nov. 7, 1988.

No. 87-5613 Submitted Pursuant to
Third Circuit Rule 12(6) Nov. 7, 1988.

Decided Jan. 9, 1989.

Argued June 15, 1988

Before MANSMANN, SCIRICA, and COWEN, Circuit Judges.

Reargued En Banc Nov. 7, 1988

Before SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA and COWEN, Circuit Judges.

OPINION OF THE COURT

STAPLETON, Circuit Judge:

I.

Appellants Yaffa Levy and Moshe Gozlon-Peretz were convicted by a jury in the United States District Court for the District of New Jersey on three counts. Count One of the Superseding Indictment charged participation in a conspiracy to distribute more than a kilogram of heroin, in violation of 21 U.S.C. §§ 841(a)(1), 846 (1982). Count Two charged distribution of approximately 240 grams of heroin, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2 (1982). Count Three charged possession with intent to distribute in excess of one kilogram of heroin, in violation of 21 U.S.C § 841(a)(1) and 18 U.S.C. § 2. Prior to the trial, appellant Ellus Yehuda, a co-defendant, pleaded guilty to possession with intent to distribute two kilograms of heroin.

At trial, the government relied primarily upon the testimony of Special Agent Paul Maloney, an undercover DEA agent, to convict defendants Levy and Gozlon-Peretz of, *inter alia*, conspiracy to distribute heroin on or about February 26, 1987. While Maloney was on the stand, the government elicited testimony concerning out of court statements made by Yehuda during the negotiations leading to the sale of the heroin to Maloney. The government tendered much of that testimony as probative of the truth of the assertions made by Yehuda. After Levy and Gozlon-Peretz objected to the admissibility of this evidence on hearsay grounds, the government urged that it was admissible under Federal Rule of Evidence

801(d)(2)(E) as statements made "by a coconspirator of a party during the course and in furtherance of the conspiracy." The district court applied the then governing circuit precedent, *United States v. Ammar*, 714 F.2d 238 (3d Cir.), *cert. denied*, 464 U.S. 936, 104 S.Ct. 344, 78 L.Ed.2d 311 (1983), and admitted the tendered evidence. Its action was premised on a finding pursuant to the *Ammar* standard that the record evidence, without reference to the purported co-conspirator statements, made it more likely than not that those statements were made in furtherance of a then existing conspiracy of which the defendants were members. Yehuda was available to testify at the trial but neither side chose to call him to the stand.

After the defendants were sentenced and while their appeals were pending before this court, the Supreme Court of the United States decided *United States v. Bourjaily*, 483 U.S. 171, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987). In that case, the Court disapproved the test articulated in *Ammar*, holding that a trial judge may consider all evidence, including the tendered out of court statements of the alleged co-conspirator, in deciding whether to admit the statements.

Several issues are raised in this appeal from the defendants' convictions: 1) whether there was sufficient independent evidence under this court's decision in *Ammar* to warrant the admission under Rule 801(d)(2)(E) of the out of court statements made by alleged co-conspirator Yehuda; 2) whether the false passports of the defendants and their use of false names were properly admitted into evidence; 3) whether, assuming the admissibility of the co-conspirator statements and the evidence regarding false identification, there was enough evidence

to support Levy's and Gozlon-Peretz's convictions; 4) whether retroactive application of *Bourjaily* to this case would violate notions of fundamental fairness inherent in the Due Process Clause of the Fifth Amendment; 5) whether, assuming *Bourjaily* is to be applied retroactively, there was sufficient evidence to permit the admission of the co-conspirator statements; 6) whether there is an unacceptable risk that the sentences imposed on Gozlon-Peretz and Yehuda were influenced by a misunderstanding on the part of the sentencing judge regarding the parole provisions of the Anti-Drug Abuse Act of 1986, Pub.L. 99-570, §§ 1002, 1003, 100 Stat. 3207-2 (codified at 21 U.S.C. § 841(b)(1) (Supp. IV 1986)); and 7) whether the district court erred in failing to make factual findings regarding Yehuda's ability to pay the $200,000 fine imposed upon him.

In keeping with the preferred practice of avoiding unnecessary decisions of constitutional issues, we first address the issue of whether the district court properly applied the *Ammar* standard when it admitted Yehuda's out of court statements. Because we hold that there was enough independent evidence to warrant the admission of these statements under *Ammar*, we do not reach the issue of whether *Bourjaily* could be applied here without violating due process. We also hold that the false passports and use of false identities were admissible, and that there was sufficient evidence to support Levy's and Gozlon-Peretz's convictions. We will vacate the sentences of Gozlon-Peretz and Yehuda, however, and remand for resentencing.

II.

In March, 1986, a government informant introduced Special Agent Paul Maloney of the Drug Enforcement Agency to Yehuda. For the next eleven months, Maloney, acting in an undercover role, negotiated with Yehuda in an attempt to purchase large quantities of heroin. During these eleven months Maloney had approximately fifteen to sixteen telephone conversations and half a dozen "face-to-face" meetings with Yehuda. At each of the approximately six "face to face" meetings, Yehuda and Maloney tried to negotiate a heroin transaction. None of these transactions were ever consummated; the main sticking points were Yehuda's demand that Maloney give him money "up front" before delivery of the heroin, and Yehuda's apparent inability to obtain and produce any heroin despite his repeated promises. During these negotiations Yehuda stated that he had one source of heroin in Chicago and two in Thailand.

On February 24, 1987, Yehuda called Maloney at his Atlantic City office and said that "he had something" for Maloney. They agreed to meet the next afternoon at the Pennsylvania railroad station in Newark, New Jersey. They met as arranged. During the meeting Yehuda reported that he had met "a friend" in New York whom he had previously seen in Thailand and that his friend had entered the United States with about five kilograms of heroin. Yehuda then gave Maloney a small package which later analysis revealed contained 23.6 grams of 27 percent pure heroin hydrochloride. Upon receiving the sample, Maloney told Yehuda that he would return with it to Atlantic City and have it tested; he added that if everything worked out well, he would want to buy at

least one kilogram. Yehuda responded that the price would be about $200,000 per kilogram and that he would have to check with his friend to make sure everything was all right.

At this point, Maloney and Yehuda proceeded to a pay phone in the sky walk connecting the station and the Hilton Hotel. Maloney asked Yehuda if the transaction could be consummated in Atlantic City because he not only felt safer there but could also guarantee everyone else's safety. Yehuda replied that he would check this with "his man." Upon reaching the phone, Yehuda, referring to a piece of paper, punched in a series of numbers and hung up the phone. In response to Maloney's question as to whether the line was busy, Yehuda said that he had to call a beeper number and that his call would be returned. Maloney read from Yehuda's paper one of the numbers, 401-4532, that Yehuda had used. Several minutes later Yehuda received an incoming call on the pay phone. The call lasted several minutes and was carried out in a foreign language.

After this second call, Yehuda said that it was agreed that the transaction would be done in Atlantic City, but that his friend wanted to do it one pound at a time. Yehuda explained that "his friend" wanted Yehuda to deliver one pound to Maloney, receive $110,000, then go back to get the second pound and deliver it to Maloney in return for the remainder of the purchase price ($90,000). In response to Maloney's concern about completing the transaction anywhere but Atlantic City, Yehuda said that since Maloney was the buyer, "they" would complete it wherever he wanted.

The government subsequently obtained records from a Novotel Hotel in New York City which showed that a phone call had been made to the pay phone in the Newark skywalk at 1:44 pm on February 25, 1987 from a room registered to Annette Amar, an alias used by Yaffa Levy.

At 6:55 pm the next day, Levy, Gozlon-Peretz and Yehuda arrived together at the Sands Hotel; Levy rented room 1002 using an Israeli passport in the name of Annette Amar. The hotel desk clerk testified that she saw a full red bag among the defendants' luggage. At 7:05 pm Yehuda and Maloney met at an arranged spot in the Golden Nugget Hotel lobby; Yehuda was carrying a large red bag. After proceeding to Maloney's hotel room in the Golden Nugget, Yehuda stated that he had come to Atlantic City with "his friend" and asked Maloney if he had a balance that he could borrow as his had been too bulky to bring. Maloney lent Yehuda his electronic scale, and Yehuda put it into his red bag. Yehuda stated he was going to leave the scale with "his friend" while he, Yehuda, brought the first installment of drugs to Maloney. Yehuda was to have returned the scale with the second installment, at which point Maloney would have used the scale to weigh the total delivery. They then returned to the lobby and Maloney asked Yehuda if he wanted to call his friend prior to meeting him. Yehuda declined to call, stating that "his friend" was "there" and he would go "right to there." Appendix at 56.

Yehuda was followed by a detective Imfeld of the Atlantic City Police Department from the Golden Nugget Hotel to the Sands Hotel. Yehuda hired a taxi and took a very circuitous route back to the Sands Hotel, which included retracing his steps and making a "U" turn.

Yehuda also repeatedly looked out the back window during the ride. When he arrived at the Sands Hotel he walked in circles and looked around the lobby for fifteen minutes. Yehuda then went to the elevator bank and waited for an empty elevator. Once in the elevator, Yehuda kept it on the ground floor for a "good minute" and then pushed the fifth and tenth floor buttons. After the elevator went to the tenth floor it came straight down empty.

At 8:40 pm Yehuda, carrying the red bag still containing the scale, returned to the Golden Nugget. Yehuda told Maloney that "his friend" had told him that Yehuda must see or obtain at least half the money before proceeding further. Maloney replied that this was unsatisfactory and that they had already agreed on the structure of the exchange. Yehuda then said that "it was difficult, that he had no control over it, that he was – you know, he was caught in the middle." *Id.* at 57. Maloney told Yehuda that if he had to "front" the money, the sale was off, but he did ask Yehuda to call his friend and see if a compromise could be worked out. Yehuda went to a pay phone, asked Maloney to walk around, and then talked in a foreign language for less then five minutes. After the telephone conversation, Yehuda reported to Maloney that it might be possible for Yehuda to deliver 100 grams to Maloney, at which point Maloney would show Yehuda the money. Although Maloney agreed to this arrangement, Yehuda said that he had to await another phone call as he "hadn't spoken to the guy but had spoken to his girlfriend who was in the hotel room, that the man wasn't there and that she could only say that the guy would probably give [Maloney] a hundred grams." *Id.* at 58.

Yehuda received the return call at the pay phone shortly thereafter and talked for a couple of minutes in a foreign language. Upon completing the call, Yehuda reported to Maloney that "his friend" was adamant about seeing the money first and that if he did not the transaction would not be completed. Maloney rejected the new terms, made a counter offer, and asked Yehuda to call his friend again. Yehuda complied, using the same phone as before. Maloney reported that after Yehuda placed the call, he heard Yehuda ask for room 1002 in English. After this call, Yehuda reported that "his friend" would not agree to Maloney's suggestion. They then walked through the lobby arguing about the fact that Yehuda had agreed to complete the sale one way but was now changing the agreement. During this exchange, Yehuda said that he was as surprised as Maloney when the plans were changed and that "it was difficult being caught in the middle, that he was caught between two hard dealing people, that [Maloney] wouldn't bend and his friend wouldn't bend and that he hated doing business that way." *Id.* at 60.

At 10:55 pm Yehuda, carrying the red tote bag, rented room 1430 at the Sands Hotel using the name "Holly Berthold." At approximately 11:15 pm Maloney received a message on his beeper to call a certain number. The number was that of a pay phone in the lobby of the Sands Hotel; Yehuda answered it. Yehuda told Maloney that his "friend" had relented and that he was willing to do the transaction the way Maloney had suggested; the first installment, however, was to be only 250 grams. Maloney agreed to these terms and arranged to meet Yehuda a little later.

Maloney and Yehuda met around 11:45 pm. Yehuda gave Maloney a package containing 185 grams of heroin. Moments later agents moved in and arrested Yehuda.

During the subsequent search of rooms 1002 and 1430 and the associated follow-up investigation, additional evidence was discovered. Two calls were placed from room 1002 to the pay phone Yehuda had been using the evening of February 26, 1987; one had been placed at 8:59 pm and the other at 9:55 pm. The times coincided with Yehuda's telephone conversations in Maloney's presence. During a search of room 1002, the following items were found: 1) a beeper, on a shelf near the bed with the number 401-4532 inscribed on its back; 2) foreign passports in the names of Pasquale DiStefano and Annette Amar; 3) two consecutively numbered Greyhound bus tickets from New York to Resorts International; and 4) a bill from the New York Novotel Hotel. A third Greyhound bus ticket, with a number consecutive with the two seized in room 1002, was found on Yehuda's person.

A search was also conducted of room 1430 rented by Yehuda using a passport issued in the name of Derthon Holly.[1] During the search 2,127 grams of 24 percent heroin hydrochloride and a red tote bag were recovered.

When questioned after their arrest, Gozlon-Peretz and Levy identified themselves by the aliases Pasquale DiStefano and Annette Amar respectively.

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[1] The hotel clerk apparently miscopied the name in Yehuda's false passport, misreading Holly Berthold for Derthon Holly.

III.

A.

Federal Rule of Evidence 801(d)(2)(E) provides that out of court statements made by a "coconspirator of a party during the course and in furtherance of the conspiracy" are not hearsay. The requirements of the rule are met if the person against whom the statement is offered participated in a conspiracy, the statement was made in furtherance of the conspiracy, and the conspiracy was still in progress at the time the statement was made. *Ammar*, 714 F.2d at 245; *United States v. Gibbs*, 739 F.2d 838, 843 (3d Cir.1984) (en banc), *cert. denied*, 469 U.S. 1106, 105 S.Ct. 779, 83 L.Ed.2d 774 (1985). As we have noted, before *Bourjaily* this court required the prosecution to demonstrate these three facts by a "fair preponderance of the independent evidence." *Gibbs*, 739 F.2d at 843 (quoting *United States v. Trotter*, 529 F.2d 806, 811-813 (3d Cir.1976)); *see Ammar*, 714 F.2d at 247. Thus, an out of court statement offered as a statement of a co-conspirator was admissible only if evidence other than the statement itself made it more likely than not that the defendant participated in the alleged conspiracy and that the statement was made during and in furtherance of that conspiracy. *See Gibbs*, 739 F.2d at 843, (quoting *Trotter*, 529 F.2d at 812 n. 8). The trial judge in this case correctly identified this as the then governing standard.

Levy and Gozlon-Peretz assert that the independent evidence falls short of establishing by a preponderance of the evidence that they participated in a conspiracy with Yehuda. They do not dispute that if such a conspiracy were shown, the statements could be found to have

occurred in furtherance and in the course of that conspiracy. Thus, in reviewing the district court's decision to admit Yehuda's statements under *Ammar*, our inquiry is restricted to "whether, viewing the [other] evidence in the light most favorable to the government, the district court had 'reasonable grounds' for concluding that, more probably then not, [the defendants] were coconspirators." *United States v. Inadi*, 748 F.2d 812, 817 (3d Cir.), rev'd on other grounds, 475 U.S. 387, 106 S.Ct. 1121, 89 L.Ed.2d 390 (1986); *see United States v. Janotti*, 729 F.2d 213, 218 (3d Cir.1984), *cert. denied*, 469 U.S. 880, 105 S.Ct. 243, 244, 83 L.Ed.2d 182 (1984). We hold that the district court did have reasonable grounds for so concluding.

We start with the undisputed proposition that Yehuda went to Atlantic City in February of 1987 to offer for sale and deliver a substantial quantity of heroin. It is equally clear that Yehuda was accompanied on this trip by Levy and Gozlon-Peretz and that they occupied the same hotel room during most of the time the negotiations were ongoing. Accordingly, the issue for decision is whether there is independent evidence which, when added to Levy's and Gozlon-Peretz's association with Yehuda and their proximity to the transaction, permits an inference that they were involved in the selling of the heroin. We now turn to that evidence.

The independent evidence established that Yehuda repeatedly interrupted the negotiations to use the telephone and that he repeatedly changed his position immediately following such use. Two explanatory hypotheses have been advanced by the parties in connection with this evidence. Levy and Gozlon-Peretz suggest that Yehuda was negotiating solely on his own account and

was using the apparent telephone calls as a ruse to put himself in a better bargaining position. The government, on the other hand, urges that Yehuda was acting as a broker whose role was to bring Maloney together with a party who had a large quantity of heroin to sell. Based on the independent evidence, we conclude that the district court could properly infer that Yehuda was not dealing on his own account and that the calls involved conversations with co-conspirators. Moreover, having drawn this inference, we believe the district court had ample reason to further conclude that Levy and Gozlon-Peretz were the co-conspirators whom Yehuda contacted by telephone.

First, with respect to Yehuda's role in the transaction, we find it significant that during the eleven months leading up to the February sale, Maloney had been attempting unsuccessfully to purchase heroin from Yehuda. Despite many promises to provide Maloney with samples, Yehuda had never been able to produce any heroin. In fact, one of the sticking points between Maloney and Yehuda in their negotiations was Maloney's refusal to finance Yehuda's excursions abroad to obtain heroin and arrange for suppliers. If Yehuda had had the ability to supply heroin on his own account, it would seem likely that he would have fulfilled his promises and delivered heroin to Maloney during their many dealings in 1986. His failure to do so is supportive of the inference that he was not dealing on his own account in February of 1987.

In addition, the nature of the sticking points in the February 25th and 26th negotiations were not over price or purity, as one would expect if Yehuda were the supplier trying to use clever bargaining strategy to increase his profits; rather Yehuda and Maloney haggled over who

should perform first. Yehuda wanted Maloney to pay before he delivered the drugs, and Maloney wanted the transaction done in two steps, with half of the drugs being exchanged for half the money at each stage. These disagreements are more characteristic of a broker taking instructions from a cautious supplier who did not know or trust the buyer, than of a supplier trying to drive a hard bargain with a known purchaser.

Finally, the district court was entitled to credit Maloney's evaluation that Yehuda was genuinely frustrated by finding himself "caught in the middle" and unable to consummate the transactions as planned. That frustration is supportive of the inference that Yehuda was not dealing solely on his own account and that the telephone calls were conversations with his co-conspirators.

Second, with respect to the identity of Yehuda's co-conspirators, we find the inference for which the government contends compelling. The first call made by Yehuda in Newark was placed to a beeper later found in the Sands hotel room engaged by Levy and occupied by Levy and Gozlon-Peretz. That call was returned from the New York Novotel Hotel room also occupied by them. Likewise, in Atlantic City, Yehuda made at least one call to room 1002 and two of his other calls were returned from that room.

Moreover, there are three other indications that Levy and Gozlon-Peretz were the ones in league with Yehuda. It can be inferred that the 'counter surveillance' techniques used by Yehuda on his way to the Sands Hotel from his 7:05 pm meeting with Maloney were an attempt

to protect the people and drugs in room 1002 from detection. In addition, the absence of other contacts between Yehuda and third parties, as revealed by police surveillance, tends to exclude the likelihood of an unknown third party being the supplier. Finally, the 'guilty consciousness' demonstrated by Levy and Gozlon-Peretz in giving false names upon arrest also tends to indicate that they were not just innocent bystanders vacationing in Atlantic City.

For these reasons, we conclude that there was sufficient independent evidence to make it more likely than not that Levy and Gozlon-Peretz were participants with Yehuda in a conspiracy to distribute heroin. We find that independent evidence every bit as probative of a conspiracy as the independent evidence in *Gibbs*, 739 F.2d 838, and in *United States v. Leon*, 739 F.2d 885 (3d Cir.1984). Contrary to appellants' contention, we also find our conclusion entirely consistent with *United States v. Wexler*, 838 F.2d 88 (3d Cir.1988), in which the court concluded that a defendant who aided in the transportation of a truck containing illegal drugs did not have reason to know that the truck contained anything other than stolen goods. First, in this case, unlike *Wexler*, there is evidence from which one can rationally infer that the defendants were the suppliers of the drugs. Second, in *Wexler* the government had to show enough evidence to support a *conviction*, a far heavier burden than it labors under here.

B.

Levy insists that the district court erred in admitting evidence of her possession of a passport issued in the

name of Annette Amar and of her use of that fictitious name. Making reference to the "international traveling statutes," she characterizes this evidence as "other crimes evidence" and asserts that, even it if has some relevance, its probative value is outweighed by its potential for undue prejudice. Gozlon-Peretz makes a similar argument. We are unpersuaded.

The use of false passports and identities by the defendants is relevant for at least three reasons. First, defendant Levy's use of her "Annette Amar" alias in checking into the two hotel rooms, supports the government's contention that she was the "front person" for Gozlon-Peretz and Yehuda, protecting their identities while they completed the heroin sale. If the sale had been consummated as planned, the only direct link to Gozlon-Peretz would have been the fading memory of the Sands Hotel desk clerk. Thus, the use of the false identity could be seen as part of the defendants' plan in implementing the conspiracy, a safety measure to protect Gozlon-Peretz in case the buyer was later arrested. Second, the defendants' attempt to conceal their true identities by providing aliases to the police upon arrest is relevant as consciousness of guilt. *United States v. Kalish*, 690 F.2d 1144, 1155 (5th Cir. 1982), *cert. denied*, 459 U.S. 1108, 103 S.Ct. 735, 74 L.Ed.2d 958; *see also United States v. Boyle*, 675 F.2d 430 (1st Cir.1982); *Leon*, 739 F.2d at 893 n. 19. Finally, the use of false identities by all three conspirators also tended to show joint planning and coordination by the defendants in an attempt to protect themselves from future investigation and pursuit.[2]

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[2] Yehuda used several false names during his dealings with Maloney. At the times Yehuda called Maloney he usually

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Federal Rule of Evidence 404(b) was not violated because the challenged evidence thus tended to show preparation, plan, and state of mind. Similarly, we conclude that Rule 403 was not breached because this evidence had significant probative value and very little, if any, potential for undue prejudice. Evidence of illegal entry into the United States is not likely " 'to suggest a decision on an improper basis, [for instance] an emotional one.' " *Weinstein's Evidence*, ¶ 403[03] (quoting the Advisory Committee's Note to Rule 403). Nor is it likely to arouse the jury's sense of horror, provoke its instinct to punish, or lead the jury to base its decision on something other than the established facts in the case. *Id.* at ¶ 403[03]. The trial judge clearly did not abuse his discretion in admitting this evidence.

C.

In evaluating Levy's and Gozlon-Peretz's argument that all the above facts, considered together, do not show that they had the requisite knowledge and intent to convict them of the crimes charged, we must decide "whether, viewing the evidence most favorably to the government, there is substantial evidence to support the verdict." *Wexler*, 838 F.2d at 90. We find that the record contains the requisite support.

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identified himself as "George," when he checked into hotels in New Jersey he told Maloney to ask for "Mr. Sabag," and when he arrived in New Jersey in February of 1987 he used the name of Berthold Holly to rent room 1430 at the Sands Hotel.

In Levy's case, she used a false name both to rent the hotel rooms, which were used as 'command posts,' and to mislead the police after she was arrested. She traveled to Atlantic City with Gozlon-Peretz and Yehuda, Gozlon-Peretz stayed with her in both rooms, Yehuda called the rooms she had rented during the course of the negotiations, and Gozlon-Peretz used those rooms to return Yehuda's calls. Moreover, it might also be inferred that the drugs were kept in the room she had rented at the Sands Hotel for most of the negotiating period on February 26, 1987.[3] And most importantly, Levy received a phone call from Yehuda, proposed a compromise to keep the transaction alive, and passed the proposed compromise on to Gozlon-Peretz.

This evidence supports the jury's conclusion that Levy not only had knowledge of the conspiracy but also played a significant role in bringing it to fruition.

The evidence supporting Gozlon-Peretz's conviction is stronger than that supporting Levy's. Not only did he travel to Atlantic City with Levy and Yehuda, aid in engaging room 1002, occupy the "command posts" with Levy and give a false name to the police, but the jury was also entitled to infer from Yehuda's many co-conspirator

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[3] The drugs had to be somewhere when Yehuda met with Agent Maloney at 7:05 pm. The most probable place would be in the room that his likely suppliers had rented, especially given the permissible inference that he went to room 1002 after telling Maloney that he was going to leave the scale with "his friend" so that the friend could measure out the drugs before delivery. Yehuda only rented room 1430, where the rest of the drugs were found, at 10:55 pm.

statements that Gozlon-Peretz was the supplier of heroin who used Yehuda to dictate the terms of the sale.

D.

We now turn to the question of whether error was committed in the sentencing of Gozlon-Peretz and Yehuda. Gozlon-Peretz was sentenced on Count Three to twenty years in prison, a Special Parole Term of five years, a "stand committed" fine of $200,000 and a $50 Special Assessment. The court also imposed concurrent twenty year terms on Counts One and Two, a Special Parole Term under Count Two, and additional Special Assessments.

On Count Three, Yehuda was sentenced to twenty years in jail, a Special Parole Term of five years, a "stand committed" fine of $200,000, and a Special Assessment of $50.

After sentence was imposed, the Assistant U.S. Attorney sought to clarify the import of Gozlon-Peretz's sentence under the new drug sentencing laws and engaged in the following exchange with the sentencing judge:

> Is it my understanding that Count 3, being the more severe count, that the defendant is also sentenced to a mandatory minimum term of ten years in prison, which he must serve without probation or parole; and that on Count 2 that there is a minimum of five years, which he must serve without probation or parole; is that correct, Judge?

Appendix at 291. To which the judge replied, "[t]hat's correct. That's correct." *Id.*

The prosecutor's statement of the parole consequences of the sentence imposed was not correct. The relevant sentencing provisions, as revised in October 1986,[4] state that "[n]o person sentenced under this paragraph shall be eligible for parole during the term of imprisonment imposed therein." 21 U.S.C. § 841(b)(1)(A)(i), (b)(1)(B)(i). Thus, with respect to at least two of his twenty year sentences,[5] Gozlon-Peretz is not entitled to be considered for parole at any time.

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[4] The provisions of the Anti-Drug Abuse Act of 1986, Pub.L. 99-570, §§ 1002 & 1003, amending the relevant aspects of 21 U.S.C. § 841(b)(1) became effective immediately upon the signature of the President on October 27, 1986. *U.S. v. Meyers*, 847 F.2d 1408 (9th Cir.1988); U.S. Dept. of Justice, *Handbook on the Anti-Drug Abuse Act of 1986*, at ix (Crim.Div.1987).

[5] It is doubtful whether Gozlon-Peretz's twenty year sentence on Count One, which alleges a conspiracy to distribute heroin in violation of 21 U.S.C. § 846, implicates the provisions of the Anti-Drug Abuse Act of 1986 prohibiting parole. See, *Handbook on the Anti-Drug Abuse Act of 1986*, at 17-20; *United States v. Jureidini*, 846 F.2d 964 (4th Cir.1988). We need not decide this issue, however, because where the sentences imposed on two of three counts are vacated and all three sentences arise from the same criminal transaction, it is appropriate to vacate the third, valid sentence, *see, United States v. Rosen*, 764 F.2d 763 (11th Cir. 1985), *cert. denied*, 474 U.S. 1061, 106 S.Ct. 806, 88 L.Ed.2d 781 (1986), in order to afford the trial judge an opportunity to properly exercise his sentencing discretion, *United States v. Grayson*, 795 F.2d 278, 287 (3d Cir. 1986), *cert. denied*, 481 U.S. 1018, 107 S.Ct. 1899, 95 L.Ed.2d 505 (1987) and to "reduce the possibility of disparate and irrational sentencing." *United States v. Busic*, 639 F.2d 940, 948 (3d Cir.), *cert. denied*, 452 U.S. 918, 101 S.Ct. 3055, 69 L.Ed.2d 422 (1981); *cf. United States v. Hawthorne*, 806 F.2d 493, 499-501 & n. 14 (3d Cir.1986).

Based upon the exchange between the prosecutor and the court, there is an unacceptable risk that at least two of Gozlon-Peretz's current sentences are the result of a misconception concerning their legal effect. Accordingly, under *United States v. Katzin*, 824 F.2d 234, 240 (3d Cir.1987) ("sentencing on the basis of materially untrue assumptions violates due process") (citing *United States v. Tucker*, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972)); *United States v. Kerley*, 838 F.2d 932, 941 (7th Cir.1988) (remand for resentencing required when sentence may have been based on legal and factual misunderstandings), Gozlon-Peretz is entitled to have his sentences on Counts Two and Three vacated.[6] We will vacate Gozlon-Peretz's sentences and will remand for resentencing.

Yehuda's sentence, imposed on the same day as Gozlon-Peretz's, was similarly flawed.[7] We will also vacate Yehuda's sentence and remand for resentencing.

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[6] In view of our decision on this issue we need not reach appellant Gozlon-Peretz's claim of ineffective assistance of counsel during the sentencing phase.

[7] The following colloquy occurred with respect to Yehuda:

> THE COURT: . . . It is adjudged on Count 3 that the defendant is hereby committed to the custody of the Attorney General of the United States or his authorized representative for a *term of 20 years* plus five years special parole, and is fined two hundred thousand dollars. The defendant is ordered to stand committed until the fine is paid or he is otherwise discharged by due process of law. Special assessment of 50 dollars is imposed.

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In addition, Yehuda also challenges the "stand committed" fine of $200,000 imposed on him by the district court judge in the absence of any factual findings regarding his ability to pay that fine. The judge ordered that the "defendant . . . stand committed until the fine is paid or he is otherwise discharged by due process of law." We confess to some uncertainty as to what the judge intended by this language. Given that the judge apparently believed Yehuda was destined to spend a minimum of ten years in prison without regard to whether the fine was paid, the reference to a discharge by due process of law may reflect an anticipation on his part that Yehuda

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. . . .

> Asst. U.S. Atty.: Yes Judge. But first one additional inquiry. Am I given to understand that the court also has imposed a *ten year mandatory minimum*, which the statute requires in this instance?
>
> THE COURT: I have on my presentence investigation report the penalty as five years special parole.
>
> Asst. U.S. Atty.: Judge, with the amount that he pleded [sic] guilty to it was – *no, I'm talking about the mandatory minimum of the incarceration*. There is a five years [sic] mandatory special parole, but the offense to which the defendant pleaded guilty carries a ten year mandatory minimum.
>
> THE COURT: The ten year mandatory minimum takes care of that.
>
> Asst. U.S. Atty.: Does it?
>
> THE COURT: Correct, its a statutory minimum. [sic]

Appendix to Yehuda's Brief at 46-47 (emphasis added).

could raise any "ability to pay" issue in a subsequent proceeding if a failure to pay the fine ever became the sole reason for his incarceration.

Because of our disposition of the other sentencing issue, we find it unnecessary to decide whether the district judge's failure to make a finding regarding Yehuda's ability to pay was reversible error in this context. When the district court holds a resentencing hearing for Yehuda following remand, it will have before it a defendant who was determined at the commencement of this appeal to be unable to pay court costs. With indigency having been so established, we think it likely that the district court either will decline to impose a "stand committed" fine or will accompany the imposition of such a fine with an explanation of its purpose. Clearly, that would be the preferable practice in these circumstances.[8]

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[8] There is general agreement that a district court has authority to impose a "committed fine," that is a fine which will result in incarceration until payment is made. *See, e.g., Hill v. U.S. ex rel. Wampler*, 298 U.S. 460, 56 S.Ct. 760, 80 L.Ed. 1283 (1936). The purpose of such a fine, however, is to assist enforcement of the order imposing it, *e.g., Williams v. Illinois*, 399 U.S. 235, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970), a purpose that is not served by the imposition of a "committed fine" on an indigent defendant. The Court of Appeals for the Ninth Circuit, however, has held that, though an indigent defendant may not ordinarily be incarcerated for non-payment of a fine, this principle does not impair the validity of a judgment containing a committed fine if there is reason to believe that the defendant's ability to pay will be determined before the defendant is held solely on the basis of the non-payment of the fine. *United States v. Estrada de Castillo*, 549 F.2d 583 (9th Cir.1976);

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IV.

Since the evidence challenged by Levy and Gozlon-Peretz was properly admitted and as there was sufficient evidence to support their convictions for the crimes charged, we will affirm their convictions. We will vacate Yehuda's and Gozlon-Peretz's sentences and remand for resentencing.[9] Levy's sentence will be affirmed.

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United States v. Miller, 588 F.2d 1256 (9th Cir. 1978). The argument in favor of this position sanctioning reliance on a subsequent determination of the defendant's ability to pay becomes stronger where, as here, there is a lengthy term of imprisonment in addition to the fine. Nevertheless, the likelihood of a material increase in assets during incarceration normally will not be substantial and, if there is any reason at the time of sentencing to question whether the defendant is financially responsible, we think it at least prudent for the sentencing judge to address the ability-to-pay issue before imposing a committed fine. If the court's decision is in favor of imposing such a fine, its supporting findings will be of assistance in the event the fine ultimately becomes the only basis for detaining the defendant. If the court decides against a committed fine because of the defendant's financial position or for any other reason, the possibility of a commitment to incarceration remains open, of course, if it can later be shown that the defendant has failed to pay despite an ability to do so. *See Tate v. Short*, 401 U.S. 395, 400, 91 S.Ct. 668, 671, 28 L.Ed.2d 130 (1971).

[9] Given our decision to remand for resentencing, we need not reach Yehuda's Eighth Amendment argument.

United States Court of Appeals,
Third Circuit.

UNITED STATES of America

v.

Moshe GOZLON-PERETZ, Appellant.

No. 89-5330.

Submitted Under Third Circuit Rule 12(6)
Oct. 16, 1989.

Decided Jan. 25, 1990.

As Amended Feb. 6, 1990.

Before BECKER, COWEN and SEITZ, Circuit Judges.

OPINION OF THE COURT

BECKER, Circuit Judge.

This appeal by Moshe Gozlon-Peretz challenges the imposition of a five-year term of special parole, as part of a sentence for a drug conviction, on the ground that in February 1987, when the offense was committed, it was not punishable by a special parole term. During the 1970's and 1980's, special parole became a staple of the penalty scheme prescribed by Congress for drug offenses. However, in amending 21 U.S.C. § 841(b) pursuant to the enactment of the Comprehensive Crime Control Act of 1984, Congress failed to provide for special parole in § 841(b)(1)(A), which defines the high volume drug crime for which appellant was convicted and sentenced.

Appellant acknowledges that in the Anti-Drug Abuse Act of 1986, Pub.L. No. 99-570 Tit. I (1986) ("the ADAA"),

which amended the 1984 Act. Congress created an alternative to special parole – the so-called term of supervised release. However, appellant contends that Congress intended supervised release to be complementary to the Sentencing Reform Act's new guidelines sentencing regime, which did not become effective until November 1, 1987. Because the offense in question occurred in February 1987, appellant submits that he is not subject to a term of supervised release either.

The government responds that Congress intended the 1986 legislation, which was enacted on October 27, 1986 and had no effective date provisions, to become effective immediately. Such a reading, the government maintains, requires the imposition of special parole, not supervised release, in this case. We do not agree with the government's contention that an immediate effective date would resuscitate the moribund special parole sentencing option, but we do believe that Congress intended the supervised release provisions to become effective immediately. Accordingly, we will vacate the judgment of sentence, and remand to the district court with directions to vacate the sentence of special parole and to impose a term of supervised release.[1]

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[1] The appellant's only other claim – that the district court's imposition of a special assessment of $50.00 on each count was invalid because 18 U.S.C. § 3013 was enacted in contravention of the origination clause, U.S. Const. art. I, § 7, cl. 1 – has been foreclosed by our opinion in *United States v. Simpson*, 885 F.2d 36 (3d Cir.1989).

I.

A.

The background facts are set forth in our opinion in *United States v. Levy*, 865 F.2d 551 (3d Cir.1989) (in banc). There, we vacated Gozlon-Peretz's sentence and remanded for resentencing. On remand, the district court imposed large fines and lengthy prison terms followed by a five-year special parole term, pursuant to 21 U.S.C. § 841(b)(1)(A).

Before 1984, certain sentences imposed under the applicable sentencing provision in this case, 21 U.S.C. § 841(b), were required to include a special parole term. *See* 21 U.S.C. § 841(b) (1982). On October 12, 1984, Congress enacted the Comprehensive Crime Control Act, Pub.L. No. 98-473, 98 Stat. 1837, 1976 (1984) ("the Act"), which amended existing federal drug law.[2] Among these amendments, the Act created three levels of offenses based upon the weight of the drugs in question. Specifically, Congress amended § 841(b) by:

> (1) eliminating special parole for offenses committed after the effective date of the Act (originally November 1, 1986, and later changed to November 1, 1987);
>
> (2) redesignating old §§ 841(b)(1)(A) and (B) as new §§ 841(b)(1)(B) and (C), respectively; and
>
> (3) creating a new class of sentences under "new" § 841(b)(1)(A), which provided for higher sentences for greater weights of drugs.

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[2] The Sentencing Reform Act was one chapter of the Comprehensive Crime Control Act. *See* 98 Stat. 1976, 1987.

98 Stat. at 2030, 2068. *See also United States v. De Los Reyes*, 842 F.2d 755, 757 (5th Cir.1988). Apparently through oversight, new § 841(b)(1)(A) did not mention a special parole term. Acknowledging that oversight, neither party here contends that special parole or supervised release can be imposed for crimes committed between October 12, 1984 and October 27, 1986, the date of the ADAA's enactment. *See United States v. Phungphiphadhana*, 640 F.Supp. 88 (D.Nev.1986); *United States v. Mowery*, 703 F.Supp. 940 (M.D.Ga.1989). Appellant maintains, however, that special parole cannot be imposed on any § 841(b)(1)(A) offense committed between October 12, 1984, and November 1, 1987, the effective date of the Sentencing Reform Act.

In § 1002 of the ADAA, Pub.L. No. 99-570, 100 Stat. 3207-2 to 3207-4 (1986), Congress again amended § 841(b) by:

> (1) striking the existing §§ 841(b)(1)(A) and (B);
>
> (2) reattaching and redesignating § 841(b)(1)(C) as § 841(b)(1)(D);
>
> (3) adding three new subsections: new §§ 841(b)(1)(A), (B), and (C);
>
> (4) attaching mandatory "supervised release" to new §§ 841(b)(1)(A), (B), and (C).

The amendments thus prescribed four offense levels instead of three, based upon the weight of the drugs. These enhanced prison terms and fines and the attendant terms of "supervised release" were made applicable to the first three parts of § 841(b), including § 841(b)(1)(A), the section under which appellant was sentenced. Section

1002 did not carry an express provision for its effective date.

In contrast, section 1004 of the ADAA, Pub.L. No. 99-570, 100 Stat. 3207 3207-6 (1986), which deleted all remaining references to special parole terms and substituted for them the term "supervised release," specifically provided that it was to take effect at the same time as 18 U.S.C. § 3583, which was part of the Sentencing Reform Act, 18 U.S.C. § 3551 *et seq.* (Supp. IV 1986). Because of a legislative postponement, that Act, originally scheduled to go into effect on November 1, 1986, did not go into effect until November 1, 1987. *See* Pub.L. No. 99-217, § 4, 99 Stat. 1728 (1985).

B.

We find that under § 1002 of the ADAA, appellant is subject to a mandatory minimum five-year term of supervised release in addition to his term of imprisonment. That is the result reached on essentially identical facts in *United States v. Torres*, 880 F.2d 113 (9th Cir.1989), which held that the regime of supervised release under § 841(b)(1)(A) came into being on October 27, 1986, the date of enactment of the ADAA. A number of other cases hold that § 1002 did not go into effect (and supervised release for drug cases did not come into being) until November 1, 1987. *See United States v. Whitehead*, 849 F.2d 849, 860 (4th Cir.1988); *United States v. Smith*, 840 F.2d 886, 889 (11th Cir.1988); *United States v. Byrd*, 837 F.2d 179, 181 (5th Cir.1988). These cases are arguably explained by the fact that they all involved lower volume drug offense provisions, for which special parole was not abolished

until November 1, 1987. *See* § 1004(b) of the ADAA, 100 Stat. at 3207-6. In each of these cases, the courts vacated terms of supervised release and directed that the district court impose terms of special parole instead, thus treating supervised release and special parole as somewhat interchangeable concepts. That course of action cannot be followed here because no special parole term is available for violations of § 841(b)(1)(A) occurring after October 12, 1984.

We do not dispute that special parole and supervised release are closely related mechanisms for post-release supervision of federal offenders.[3] However, the substitution of supervised release for special parole of federal offenders was not accidental:

> The legislative history of the [Sentencing Reform Act of 1984] shows that Congress was dissatisfied with the "old" law which conditioned the length of time a defendant was supervised on parole solely on the length of the original term; the smaller percentage of the term a prisoner served in prison, the longer the period of parole supervision. Congress decided to replace this system with one that would make both the existence and the length of post-incarceration supervision dependent on the judge's decision as to whether community supervision was needed in an individual case. The Senate

[3] The bill originated in the Reagan Administration, not the Congress. As sent by the President to the Congress, *see* "The Drug Free America Act of 1986: A Proposal to Congress From the President of the United States," the bill spoke of special parole. *See* Proposal § 502(1)(A)(VII). It was Congress that invented "supervised release."

> Report in the section-by-section analysis explained this approach:
>
> > Unlike current law, however, probation officers will only be supervising those releasees from prison who actually need supervision, and every releasee who does need supervision will receive it.

Slawsky, Looking at the Law, 53 Federal Probation 69, 70 (June 1989) (quoting S.Rep. No. 225, 98th Cong., 2d Sess 125, *reprinted in* 1984 U.S.Code Cong & Admin.News 3182, 3308). Thus, Congress had more than formal reasons for supplanting (special) parole with supervised release, and to the extent that the *Whitehead*, *Smith*, and *Byrd* courts found the two mechanisms to be substantively the same, we disagree with their holdings.

We hold that supervised release became effective on October 27, 1986. We acknowledge that supervised release was conceptually linked to the regime of the Sentencing Reform Act, which did not become effective until November 1, 1987, but we do not believe that supervised release terms are inseparable from the Sentencing Reform Act's regime. Two basic principles of statutory construction compel our holding. First, absent indication to the contrary, a statute takes effect on the date of its enactment. *See Air-Shields, Inc. v. Fullam*, 891 F.2d 63, 65 (3d Cir.1989); 2 Sutherland's Statutory Construction § 33.06 (4th ed. 1986). Second, courts must impute a reasonable purpose to Congress, and it is unreasonable to think that Congress wanted to maintain special parole for all offenses committed up until November 1, 1987. A number of considerations support this view, as reasoned by Ms. Slawsky, Assistant General Counsel of the Administrative Office of the United States Courts:

> [G]iven the relatively long periods of incarceration required by these sections, by the time most of these defendants returned to the community, the supervised release provisions of the Sentencing Reform Act would be in effect, and . . . by the time some of the defendants served their long mandatory minimum terms of imprisonment, the Parole Commission would no longer be in operation to supervise special parole terms.

Slawsky, *supra*, at 86. Thus, supervised release will de facto replace special parole for offenses committed after November 1, 1987. Furthermore, supervised release will be administered by the federal probation service whereas special parole is administered by the United States Parole Commission, which will expire by operation of law in 1992. *See* section 235 of the Sentencing Reform Act, 98 Stat. at 2031-32, (stating that chapter 311 of Title 18 of the United States Code, 18 U.S.C. § 4201 *et seq.*, remains in effect until five years after the effective date of the Act). Although a successor agency will doubtless be created, its anatomy and powers are unknown.

Additionally, to the extent that Congress did inadvertently leave special parole out of the 1984 Act and intended to correct its error with respect to high volume drug offenses in the ADAA, it is not reasonable to believe that Congress intended to correct a previous error by making the correction effective two years hence. Thus, we hold that supervised release came into effect with the enactment of the ADAA, on October 27, 1986.[4]

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[4] We do not find the explicit invocation of the later effective date (November 1, 1987) for "the amendments made by

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We recognize that this holding perpetuates a circuit split. We join the Ninth Circuit in holding that supervised release became effective when the ADAA, became effective. Although the Fourth, Fifth and Eleventh Circuits were not faced with situations where the defendant would be unsupervised (the defendants in those cases were charged with distributing smaller quantities of drugs so that special parole applied, *see supra*, at 1404), the district courts in those circuits are bound by the *Whitehead*, *Smith*, and *Byrd* decisions "across the board."

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this section" in § 1004(b) of the ADAA, 100 Stat. at 3207-6, to be inconsistent with our holding. The "section" referred to in § 1004 means only § 1004 itself, not the entire ADAA, and the amendments referred to, contained in § 1004(a), strike out the term "special parole" and insert the term "supervised release." These amendments were necessary because, although § 1002 of the ADAA inserted supervised release for some offenses which had previously been special parole offenses (21 U.S.C. § 841(b)(1)(A), (B) & (C)), it did not insert supervised release for all special parole offenses. For instance, special parole was retained for 21 U.S.C. §§ 841(b)(1)(D), 845, 845a, 845b, and 960(b)(4). Thus, § 1004(b) was necessary to effectuate the change from special parole to supervised release for all those offenses for which the ADAA had not already implemented supervised release.

We also note in this regard that the government's argument that special parole, not supervised release, is the appropriate post-release supervision mechanism to fill the void created by the legislative confusion, is undetermined by the fact that Congress, in passing the ADAA, perpetuated special parole for some offenses, but not for others. It appears that Congress knew which offenses it wanted special parole to apply to in the interim period, and 21 U.S.C. § 841(b)(1)(A) was not one of them.

At first reading this point may seem technical, but its practical consequences are enormous because responsibility for supervising post-release offenders will be divided, for no logical reason, between the probation service, for people sentenced to supervised release, and the U.S. Parole Commission or its successor, for people sentenced to special parole.[5] The problem is compounded by the fact that supervision by the judiciary is frequently transferred from one district to another, *see* 18 U.S.C. § 3605, and the transferee district may be in a different circuit with a different rule as to whether special parole or supervised release is the proper sentence. The anatomy of the problem that may arise in the event that such a sentence is challenged in a proceeding under 28 U.S.C. § 2241 is described in the margin.[6] For these reasons the

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[5] We note that a special parole term may require more community supervision because, upon revocation of a special parole, an individual may be re-paroled. By comparison, after revocation of a supervised release term, there is no provision for additional post-release supervision.

[6] Assume a transferor district on a regime of supervised release and a transferee district on a regime of special parole. While many courts may find that the sentence as imposed is the sentence that controls, this situation will at the very least lead to increased litigation. In this situation, if the Court attempts to revoke supervised release, the defendant can claim that the Parole Commission has jurisdiction and that the Commission's reparole guidelines should apply. A defendant in such a situation could also claim that he is entitled to early termination of parole pursuant to 18 U.S.C. § 4211(c), a provision that has no parallel for supervised release. Such scenarios serve to underscore that, given the clear split in the circuits, similarly situated releasees will often be treated differently.

Supreme Court might wish to consider resolving the circuit conflict.

The judgment of sentence will be vacated and the case remanded with directions to impose a term of supervised release in lieu of a term of special parole. In all other respects, the judgment of sentence will be affirmed.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 89-5330

UNITED STATES OF AMERICA

vs.

MOSHE GOZLON-PERETZ,

Appellant

(D.C. Crim. No. 87-00080-03)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE ___ DISTRICT OF NEW JERSEY

Present: BECKER, COWEN and SEITZ, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the ___ District of New Jersey and was submitted under Third Circuit Rule 12(6) October 16, 1989.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered April 14, 1989, be, and the same is hereby vacated insofar as the judgment of sentence and the cause remanded to the said District court with direction to impose a term of supervised release in lieu of a term of special parole. It is further ordered and adjudged that the judgment of sentence is affirmed in all other

respects. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Sally Minos
Clerk

January 25, 1990

No. 89-5330

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Certified as a true copy and issued in lieu of a formal mandate on February 16, 1990.

Test: /s/ M. Elizabeth Ferguson

Chief Deputy Clerk, United States Court of Appeals,
for the Third Circuit

SUPREME COURT OF THE UNITED STATES

No. 89-7370

Moshe Gozlon-Peretz,

Petitioner

v.

United States

June 18, 1990

ON PETITION FOR WRIT OF CERTIORARI TO THE United States Court of Appeals for the Third Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby granted limited to the following question:

> Whether the mandatory minimum terms of supervised release required by the Anti-Drug Abuse Act of 1986 became effective for offenses committed on or after the date of enactment, October 27, 1986.

Filed August 6,1990

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 89-5330

UNITED STATES OF AMERICA

v.

MOSHE GOZLON-PERETZ,

Appellant

On Appeal From the United States District Court For the District of New Jersey

(D.C. Crim. No. 87-00080-03)

Submitted Under Third Circuit Rule 12(6)
October 16, 1989

Before: BECKER, COWEN and SEITZ,
Circuit Judges.

ORDER AMENDING OPINION

The opinion in the above-captioned case, filed January 25, 1990, is amended as follows:

On page 8, line 15, delete "supra at 86" and insert "Looking at the Law 52 Federal Probation 86, 86 (June 1988)". Because the Supreme Court has granted certiorari in this case, No. *89-7370*, the Clerk is directed to certify a copy of the amendment to the slip opinion to the Clerk of the United States Supreme Court.

BY THE COURT:
/s/ Edward R. Becker
Circuit Judge

DATED: August 6, 1990

No. 89-7370 (5)

In The

Supreme Court of the United States

October Term, 1990

MOSHE GOZLON-PERETZ,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Did the mandatory minimum terms of supervised release required by the Anti-Drug Abuse Act of 1986 become effective for offenses committed on or after the date of enactment, October 27, 1986, or was the effective date for these provisions instead November 1, 1987, when the Sentencing Reform Act, defining supervised release and establishing guidelines for its imposition, went into effect?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (Moshe Gozlon-Peretz and the United States). Ellus Yehuda and Yaffa Levy were codefendants in the district court and were parties to the initial direct appeal. Neither was a party to the appeal after resentencing on remand, and neither is a party in this Court.

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TABLE OF AUTHORITIES – Continued

The Opinion of the United States Court of Appeals for the Third Circuit on appeal after remand is published as *United States v. Gozlon-Peretz*, 894 F.2d 1402 (3d Cir. 1990). J.A. 43, 54 (judgment). The Third Circuit's opinion affirming the convictions on direct appeal is *United States v. Levy*, 865 F.2d 551 (1989) (in banc); J.A. 19. There is no published opinion of the District Court.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on January 25, 1990. The petition for certiorari was filed April 25, 1990, and was granted June 18, 1990. This Court's jurisdiction rests upon 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case presents sentencing issues arising out of the petitioner Moshe Gozlon-Peretz's convictions for possession and distribution of heroin in February of 1987.

a. Procedural History

After a jury trial in the United States District Court for the District of New Jersey (Hon. John F. Gerry, Chief U.S.D.J., presiding), petitioner Moshe Gozlon-Peretz was convicted on May 21, 1987, J.A. 2-3 (Dkt. # 25), of all three counts in a superseding indictment charging conspiracy and possession with intent to distribute heroin on February 26, 1987, in violation of 21 U.S.C. §§ 841(a)(1), 846.

J.A. 14 (indictment). The petitioner's conviction on Count 3 was for possessing with intent to distribute in excess of one kilogram of heroin; his conviction on Count 2 was for aiding and abetting distribution of a separate 240 grams of heroin on that date.[1] Sentence was imposed on August 14, 1987. J.A. 4 (Dkt. # 34).

Petitioner Gozlon[2] and a co-defendant, Levy, appealed their convictions and sentences; the third co-defendant, Yehuda, appealed the sentence imposed upon his plea of guilty. The court of appeals (per Stapleton, J.) affirmed petitioner's and Levy's convictions (and Levy's sentences). *United States v. Levy*, 865 F.2d 551 (3d Cir. 1989) (in banc) J.A. 19. However, the appellate court vacated petitioner's and Yehuda's sentences and remanded for resentencing. The court of appeals held that the district court had apparently imposed 20 year terms against both defendants on Count 3 mistakenly believing, as suggested by the prosecutor, that the statute prohibited parole for the first 10 years of the sentence but carried parole eligibility after that time. *Id.* at 559-61; J.A. 37-39.

Chief Judge Gerry resentenced the petitioner on April 14, 1989. Because the special parole provisions of 21 U.S.C. § 841(b)(1)(A) had been repealed by § 502 of the

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[1] His conviction on Count 1 was for conspiracy in violation of 21 U.S.C. § 846 to possess and distribute heroin. Under § 846 as then in effect, neither special parole nor supervised release could be imposed. See *Bifulco v. United States*, 447 U.S. 381 (1980). The 20-year concurrent sentence on Count 1 is therefore not at issue in this Court.

[2] The petitioner Moshe Gozlon-Peretz is addressed as "Mr. Gozlon." We refer to him in this brief simply as "the petitioner," "petitioner Gozlon" or just "Gozlon."

Comprehensive Crime Control Act of 1984 (effective Oct. 12, 1984), petitioner's counsel argued that the court should not impose special parole terms on the two substantive counts. The government appeared to agree with the defense that supervised release was inapplicable to these pre-November 1987 offenses, and argued in favor of imposing special parole.

Judge Gerry noted that he was aware of defense counsel's arguments, but did not otherwise address them. The district court imposed concurrent special parole terms of five years each on the two substantive counts. The court also imposed 15 years' imprisonment on Counts 2 and 3 for possession and distribution, and 20 years for conspiracy on Count 1, all concurrent, as well as a (noncommitted) fine of $200,000 on Count 3. J.A. 18.

On appeal, the Third Circuit (Becker, J., with Cowen & Seitz, JJ.) held that the lower court had erred in imposing special parole terms, but ruled that a remand for the imposition of terms of supervised release was required. The court noted that its judgment accorded with that of the Ninth Circuit but diverged from the views of the Fourth, Fifth and Eleventh. *United States v. Gozlon-Peretz*, 894 F.2d 1402, 1404 (3d Cir. 1990); J.A. 43, 51.[3]

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[3] The Third Circuit's decision below directly conflicts with a decision of the Tenth Circuit which holds that the supervised release language of § 841(b)(1)(A), as amended in 1986, was not effective for offenses committed prior to November 1, 1987. See *United States v. Levario*, 877 F.2d 1483, 1487-89 (1989). *Levario* accords with the reasoning applied in § 841(b)(1)(B) and (b)(1)(C) cases by six other Circuits. *E.g.*, *United States v. Paiz*, 905 F.2d 1014 (7th Cir. 1990); *Mercado v. United States*, 898 F.2d 291 (2d Cir. 1990) (per curiam); *United States v. Portillo*, 863 F.2d 25 (8th Cir. 1988) (per curiam); *United States v. Whitehead*, 849

(Continued on following page)

The United States consented to the granting of certiorari. On June 18, 1990, this Court granted the petition, limited to the question as restated by the United States, which addresses supervised release only, not special parole. On that basis, this brief does not undertake to defend the part of the court of appeals' judgment by which the petitioner was not aggrieved. If this Court should decide to expand the scope of the question, the petitioner would respectfully request leave to file a supplemental brief in support of the judgment below vacating the special parole terms imposed in this case upon resentencing.

b. Statement of Facts

After several months of abortive discussions, petitioner Gozlon's co-defendant Yehuda arranged with a special agent of the U.S. Drug Enforcement Agency, acting undercover, for a sale of at least one kilogram of heroin to take place in Atlantic City, New Jersey. J.A. 23-25. On February 26, 1987, Gozlon, Levy and Yehuda travelled together from New York to Atlantic City. Levy took a tenth floor room at the Sands Hotel. After repeated

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F.2d 849, 860 (4th Cir.), *cert. denied*, 109 S.Ct. 154 (1988); *United States v. De Los Reyes*, 842 F.2d 755, 757, 758 n.3 (1988) (declining to resolve precise question presented in this case); *United States v. Smith*, 840 F.2d 886, 889-90 (11th Cir.), *cert. denied*, 109 S.Ct. 154 (1988).

The decision below accords with the decisions in *United States v. Brundage*, 903 F.2d 837 (D.C. Cir. 1990); *United States v. Torres*, 880 F.2d 113 (9th Cir. 1989), *cert. denied*, 110 S.Ct. 873, 107 L.Ed.2d 956 (1990), and *United States v. Figueroa*, 898 F.2d 825 (1st Cir. 1990).

further negotiations, during which Yehuda represented that he was required to gain approval of the details of the transaction from a "friend," Yehuda and the agent agreed on an initial delivery of 250 grams. At 11:45 p.m. that day, Yehuda made the initial delivery and was arrested; the sample was later found to consist of 185 grams of heroin. J.A. 25-28.

Agents then searched Levy's room and another that had been rented by Yehuda. Petitioner was arrested in Levy's room. Upon arrest, petitioner identified himself as shown in a false passport; circumstantial evidence suggested that he was the "friend" with whom Yehuda had been talking. Another two kilograms (2127 grams) of 24% heroin were found in Yehuda's room. J.A. 28.

SUMMARY OF ARGUMENT

Terms of supervised release could not properly be imposed as part of the sentence in this case, because the law creating "supervised release" did not go into effect until after the date when the petitioner committed his offenses. Moshe Gozlon-Peretz was sentenced for controlled substances offenses committed on February 26, 1987. The version of 21 U.S.C. § 841(b) prescribing the punishment for these crimes did not authorize the imposition of special parole terms for those offenses; a prior version which mandated special parole had been repealed more than a year before his offenses were committed. The court of appeals therefore agreed with the petitioner that the special parole terms imposed by the district court as part of the petitioner's sentence are invalid and must be vacated. J.A. 45-46, 48, 51, 53; 894 F.2d at 1403-04, 1406. ("Special parole" was an extended

form of parole unique to controlled substances cases.) However, the court of appeals ruled that the language of 21 U.S.C. § 841(b)(1)(A), as amended in 1986, required terms of supervised release on those counts and remanded for their imposition. J.A. 49-50; 894 F.2d at 1404-05. ("Supervised release" is an innovation in federal sentencing created by the Sentencing Reform Act of 1984 ("SRA") in connection with the SRA's abolition of parole, including "special parole.") The language, structure and purposes of the 1986 Act, considered together with related statutes, show that the court of appeals was wrong to hold that supervised release applied to this pre-Sentencing Reform Act case.

(a) Although § 1002 of the Anti-Drug Abuse Act ("ADAA"), which created the version of the penalty statute applied in this case, does not specify an effective date, it was not effective upon its enactment on October 27, 1986. An examination of statutory language and purpose in this case overcomes the general axiom that statutes are ordinarily deemed effective upon enactment, barring an explicit provision to the contrary.

(i) Several other provisions of the ADAA mentioning supervised release contain effective date clauses explicitly linked to the taking effect of the SRA, which occurred on November 1, 1987. Moreover, other provisions of the ADAA can be made sense of only if construed to continue special parole until November 1, 1987, with a change to supervised release occurring on that date. These related sections of the ADAA must all be construed *in pari materia* with § 1002, yielding a uniform effective date of November 1, 1987 – after the commission of the petitioner's offenses – for the supervised release provision.

(ii) The revision of 21 U.S.C. § 841(b) effected by § 1002 of the ADAA not only mandated supervised release but also abolished parole and created mandatory minimum sentences of imprisonment. Other sections of the ADAA create mechanisms to encourage accused persons to cooperate with the authorities in order to avoid these mandatory minimums, but those sections by their terms are not applicable to offenses committed before November 1, 1987. Construction of these and other provisions *in pari materia* with § 1002 show that the entire section, necessarily including its provisions for supervised release, did not go into effect until November 1, 1987.

(iii) The transition from a system allowing parole, including special parole, to one including supervised release was part of the scheme of sentencing reform established by the 1984 Act. Because the replacement of provisions for special parole with terms of supervised release does not serve the Congressional purpose of drug penalty enhancement, but rather its concurrent goal of sentencing reform, it is more reasonable to believe that Congress intended to allow a one-year delay in implementation of ADAA § 1002's supervised release provisions until such time as the related provisions of the SRA and its implementing guidelines would be in place.

(b) The legislative history of sentencing reform and controlled substances penalty revision during the 1984 to 1987 period further suggests that the mandatory terms of supervised release established by the ADAA were connected with sentencing reform and not with drug penalty enhancement. Their effective date should thus be tied to that of the SRA. Even if the legislative history of the ADAA suggests that Congress's last-minute substitution

of "supervised release" for "special parole" in several places was not well thought out, it is not so irrational or contrary to the statute as a whole as to allow for judicial intervention rather than for enforcement of the statute as written. Here, the entire statute, as enacted, can be rationally implemented so long as the unstated effective date of the SRA-related provisions is construed to be that of the SRA.

(c) The concept of "supervised release" as required by the ADAA has no meaning apart from the substantive and procedural provisions of the SRA and so must be construed *in pari materia* with that statute as well. The ADAA's supervised release provisions therefore cannot be put into effect prior to the SRA's effective date of November 1, 1987.

(d) The relevant Congressional enactments must be read, consistent with the techniques and canons of construction, without adding to the statutes any punishment which is not plainly there. Reading all the sections of the ADAA providing for supervised release together with each other and in light of related provisions of the SRA yields only one rational conclusion: that the supervised release provisions were not effective until November 1, 1987. But even if there were still ambiguity or doubt after a careful analysis of the relevant statutory language, the rule of lenity would require the same conclusion. *Bifulco v. United States*, 447 U.S. 381 (1980).

ARGUMENT

A TERM OF SUPERVISED RELEASE MAY NOT BE IMPOSED AS PART OF THE SENTENCE FOR CONTROLLED SUBSTANCES OFFENSES COMMITTED BEFORE NOVEMBER 1, 1987, WHEN THE LAW PROVIDING FOR SUPERVISED RELEASE BECAME EFFECTIVE.

Preliminary Statement. This case involves an aspect of the problems created in the transition from one system of federal criminal sentencing to another. Between 1984 and 1987, the time at issue here, Congress engineered enormous changes in federal sentencing laws. See generally *Mistretta v. United States*, 488 U.S. 361 (1989). During the same period, Congress also repeatedly changed the controlled substances statutes, including their penalty provisions. These alterations in the drug laws were not always in harmony with the overall process of sentencing reform. One of the areas of dissonant overlap involves the abolition of parole, including the extended terms of parole in controlled substances cases known as "special parole," see *Bifulco v. United States*, 447 U.S. 381 (1980), and the creation of a new form of post-confinement monitoring called "supervised release."

"Special parole" was really just *more* parole, required to be added to the unserved portion of certain prison sentences in controlled substances cases. 21 U.S.C. §§ 841(c), 960(c) (1982).[4] The length of the special parole

[4] These provisions are formally known as sections 405 of the Controlled Substances Act and section 1515 of the Controlled Substances Import and Export Act. See, *e.g.*, *Bifulco*, *supra* (referring to these provisions by Act section numbers). To minimize the proliferation of confusing section number

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term was determined by the judge at the time of sentencing, subject to a mandatory minimum term and no stated maximum. The timing and conditions of release and supervision on special parole, however, like ordinary parole, were under the control of the United States Parole Commission, as were questions of revocation and reparole. 28 C.F.R. § 2.57 (1989).

"Supervised release," on the other hand, an innovation of the 1984 Sentencing Reform Act, was designed to replace parole with relatively short, tailored terms of supervision, imposed by judges at the time of sentencing in appropriate cases only and with appropriate conditions, under the control of published guidelines and policy statements of the United States Sentencing Commission. *See* 18 U.S.C. §§ 3583, 3603(4) (Supp. V 1987). Supervised release is (like special parole, in its day) a "unique and novel concept," *Bifulco, supra*, 447 U.S. at 390, most akin to a consecutive term of probation under the control of the sentencing judge. When the Anti-Drug Abuse Act of 1986 was enacted, about one year prior to the effective date of the Sentencing Reform Act, it established mandatory terms of supervised release to be part of the punishment required for certain controlled substances offenses.

The language of the 1986 Act, its structure and purpose, and its relationship with other laws compel the

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references, provisions which have been codified are referred to throughout this brief by their U.S. Code citations, the system by which these statutes are familiar to the judges and lawyers who work with them on a daily basis. Unless there is a relevant difference between the versions in effect at one time or another, edition dates are omitted in the text of the brief.

conclusion that the terms of supervised release mandated by the 1986 Act are not applicable to offenses committed before November 1, 1987. Thus, for the reasons that follow, the judgment below should be affirmed in part (as to the vacatur of the special parole terms) and reversed in part.

A. Language and Policy of the Anti-Drug Abuse Act of 1986

The Anti-Drug Abuse Act of 1986 ("ADAA") was signed into law on October 27, 1986. Section 1002 of the ADAA radically amended 21 U.S.C. § 841(b), the statute which sets forth the applicable penalties for criminal violations of the Controlled Substances Act, including the heroin distribution and possession offenses under *id.* § 841(a) for which the petitioner was convicted. Part of the new text for several subsections of § 841(b), as amended by ADAA § 1002, specifies terms of supervised release as part of the punishment.

The provisions affected by ADAA § 1002 include subsections 841(b)(1)(A), governing convictions for possession of at least one kilogram of heroin with intent to distribute,[5] and 841(b)(1)(B), which applies to distribution of less than a kilogram but at least 100 grams of

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[5] For other drugs the equivalent thresholds are 5 kg. (cocaine mixture), 50 g. (cocaine base such as "crack"); 100 g. (pure PCP [or 1 kilogram of a PCP mixture]), 10 g. (any LSD mixture), or 1000 kg. (marijuana). ADAA § 1302(a) made the same changes in 21 U.S.C. § 960, the penalty statute applicable to controlled substance smuggling offenses.

heroin.[6] The petitioner was sentenced under these provisions on counts 3 and 2 in this case, respectively. Section 1002 does not itself contain any language specifying its effective date, nor does either the ADAA as a whole, nor its Subtitle I.A., the Narcotics Penalties and Enforcement Act of 1986 ("NPEA").[7] Because the statute at issue does not, by its express terms, answer the question presented, it is ambiguous and requires judicial construction.

Like any other issue concerning the meaning or effect of a statute, the question of when a statute became effective requires a determination of Congressional intent. As Justice Miller wrote for a unanimous Court nearly 125 years ago, rejecting a claim that the courts could not look beyond the President's signature line to determine when he signed a bill into law:

> We are of the opinion, therefore, on principle as well as authority, that whenever a question arises in a court of law . . . of the time when a statute took effect, . . . the judges who are called upon to decide it have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer . . . . ; always seeking first for that which in its nature is most appropriate, unless the positive law has enacted a different rule.

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[6] Under the 1986 revision of § 841(b)(1)(B) for other drugs the threshold is 500 g. (cocaine), 5 g. (cocaine base), 10 g. (pure PCP [100 g., PCP mixture]), 1 g. (LSD mixture), and 100 kg. (marijuana). Prior to 1986, this category had been codified under § 841(b)(1)(A) by the 1984 amendment. ADAA § 1302(a) made equivalent changes in the provisions of 21 U.S.C. § 960.

[7] ADAA § 1302, making corresponding changes in the penalty sections of the controlled substances import-export law, 21 U.S.C. § 960, likewise lacks a stated effective date.

Gardner v. Barney, Collector, 6 Wall. (73 U.S.) 499, 511 (1868).[8] In this case, the language of the 1986 statute as a whole, read in the light of its structure and purpose and its relationship with other laws, compels the conclusion that the terms of supervised release mandated by the 1986 Act are not applicable to offenses committed before November 1, 1987.

These considerations collectively overcome the general principle – long noted in this Court but apparently never the basis of a holding – that where no effective date is specified in the statute, it is deemed effective immediately upon signature by the President. *Town of Louisville v. Portsmouth Savings Bank*, 13 Otto (104 U.S.) 469, 476 (1881) (Harlan, J., collecting cases on related issues; dictum); *Matthews v. Zane*, 7 Wheat. (20 U.S.) 164, 210-11 (1822) (Marshall, C.J.) ("The known rule being, that a statute for the commencement of which no time is fixed, commences from its date . . . . "); *see generally* 2 Sutherland's Statutes and Statutory Construction § 33.06, at 12-16 (Sands 4th ed., rev. N. Singer 1986 & 1990 Cum.Supp.). Although sometimes referred to as a "rule," this canon is no more than a convenient presumption. As Justice Frankfurter put it for a near-unanimous Court:

> Generalities about statutory construction help us little. They are not rules of law but merely axioms of experience. . . . For that reason we may utilize, in construing a statute not unambiguous, all the light relevantly shed upon the words and the clause and the statute that express the purpose of Congress.

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[8] The "positive law" applicable to this case has not "enacted a different rule." *Id. See generally* 1 U.S.C. §§ 101-111 (no statutory rule for determining effective date).

United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221 (1952) (citations omitted). The general "axiom" of immediate effectiveness cannot be mechanically invoked in every case where the plain language does not answer the question, that is, where there is no other date specified.

A presumption of that kind is helpful only when resort to other accepted techniques of statutory construction fail to answer the question but instead leave an irreconcilable ambiguity. In this case, there is powerful evidence to the contrary of the presumptive rule: in the language of the ADAA, in the Act's legislative history, in the whole scheme of sentencing reform, and in the application of this Court's precedent concerning accepted presumptions and the rule of lenity.

> When 'interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature . . . .' *Brown v. Duchesne*, 19 How. [60 U.S.] 183, 194 (1857).

Kokoszka v. Belford, 417 U.S. 642, 650 (1974). As a result, the mandatory supervised release provisions of the ADAA should be construed to have a delayed effective date of November 1, 1987.

1. Only by construing November 1, 1987, to be the effective date for all supervised release provisions can the various parts of the ADAA pertaining directly to supervised release and special parole terms be reconciled.

Section 1002 of the Anti-Drug Abuse Act of 1986 ("ADAA"), which enacted the controlled substances

penalty amendment at issue and which uses the phrase "supervised release," does not itself contain an effective date clause. However, the numerous references in other sections of the ADAA to terms of supervised release, read in context, provide strong evidence that Congress did not intend any supervised release provisions to apply to offenses committed prior to the taking effect of the Sentencing Reform Act of 1984 ("SRA") on November 1, 1987. These provisions, taken together, amply refute any presumption of immediate effectiveness arising from § 1002's lack of an explicit effective date clause.

Section 1004 of the 1986 Act, which deals explicitly with the question of when mandatory supervised release became effective, ties that event to the date when the supervised release provision of the SRA will take effect. That section provides:

> **Sec. 1004. Elimination of Special Parole Terms.**
>
> (a) The Controlled Substances Act and the Controlled Substances Import and Export Act are amended by striking out "special parole term" each place it appears and inserting "term of supervised release" in lieu thereof.
>
> (b) The amendments made by this section shall take effect on the date of the taking effect of section 3583 of title 18, United States Code.

ADAA § 1004(a) does not necessarily resolve the question of when the supervised release terms mandated by § 1002 are first required. By its terms, § 1004 applies only to places in the Controlled Substances and Import-Export Acts where supervised release was to *substitute* for special parole, that is, where the phrase "special parole term" actually "appears" as part of the penalty for the offense. But the penalty statute in effect prior to the 1986 Act for the level of offenses for which petitioner Gozlon

was convicted, 21 U.S.C. § 841(b)(1)(A) (Supp. III 1985), had not provided for special parole terms since that statute's amendment in 1984. Thus, ADAA § 1004 does not literally apply to this petitioner's case. Even so, the words of the statute must not be so over-precisely construed as to defeat its purpose. See *Philbrook v. Glodgett*, 421 U.S. 707, 713-14 (1975). While the terms of § 1004 are highly relevant, they are not conclusive. Related parts of the statute contain other evidence of the effective date.

A reading of the related portions of the Act shows that all the controlled substances penalty sections calling for supervised release became effective when that mechanism would be created, defined, and controlled by guidelines, that is, on November 1, 1987, the effective date of the Sentencing Reform Act. See *Sullivan v. Everhart*, 494 U.S. ___, 108 L.Ed.2d 72, 82 (1990) ("at least reasonable, if not necessary" that different sections of same Act be read *in pari materia*). There is no good reason to think that Congress intended the penalty provisions amended by the 1986 Act to be subject immediately to a then-undefined penalty called supervised release.

The great majority of the lower courts have read § 1004 to mean that no supervised release would be in effect until November 1, 1987. See n.3 above. This prevailing construction is not inconsistent with the language of § 1004(a). That provision, written in the present tense, can be read to mean that supervised release is to be substituted for special parole as of November 1, 1987, in each place it "appears" at the present time, *i.e.*, in the law in effect on October 26, 1986, prior to the enactment of the ADAA. So construed, all existing provisions for special parole are transformed into requirements for supervised

release at the same time, the effective date of the supervised release provision of the Sentencing Reform Act.[9]

The court below offered a narrower interpretation of § 1004. J.A. 50-51 n.4; 894 F.2d at 1405 n.4. Under this reading, the present tense in the word "appears" in § 1004(a) is understood to refer to the specified effective date, November 1, 1987, rather than to the date of enactment, October 27, 1986. Thus, supervised release was to substitute for special parole each place the words "special parole term" still existed as of November 1, 1987, in the Controlled Substances Act, 21 U.S.C. §§ 801-904, and the cognate Import-Export Act, *id.* §§ 951-971, as amended at any time until that date. By virtue of § 1002 of the 1986 Act, according to the court below, subsections (A), (B) and (C) of § 841(b) would therefore not come within the delay provision of ADAA § 1004(b).

The court of appeals in this case concluded that the purpose of § 1004 was to make a transition to supervised release in those statutes where special parole was still called for after the enactment of the ADAA, because those sections had provided for special parole terms since their initial enactment and had not since been amended in pertinent respects. Under this reading of § 1004(a), according to the court of appeals, the penalty statutes to be affected by the implementation of mandatory supervised release as of November 1, 1987, were limited to 21 U.S.C. §§ 841(b)(1)(D), 841(b)(2), 845, 845a(a) and

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[9] Under that reading, mandatory terms of supervised release would be held to have supplanted special parole terms as of November 1, 1987, for offenses punishable under 21 U.S.C. §§ 841(b)(1)(B),(C) & (D), 841(b)(2), 845(a) & (b), 845a, and 960(b)(2),(3) & (4).

960(b)(4),[10] while offenses punishable under the rest of 21 U.S.C. § 841(b)(1)'s subsections, § 845a(b) and § 960(b)(1)-(3) were subject to supervised release as of October 27, 1986. The lower court's reading of § 1004, however, simply begs the question of whether the penalty-revising sections that mention supervised release of the ADAA were intended to be immediately effective. If the lower court was wrong in assuming that they were, then § 1004 would operate to make them effective on November 1, 1987.

The more inclusive interpretation of § 1004(a), under which "appears" refers to the date of enactment rather than to the delayed effective date, makes more sense. As the Fifth Circuit succinctly put the matter in the leading case on this subject, "[T]ying the effective date of the change [from special parole to supervised release] to the effective date of the implementing statute would seem the more logical arrangement." *United States v. Byrd*, 837 F.2d 179, 181 n.8 (1988). This practical interpretation of § 1004 is also the only reading which is consistent with

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[10] The lower court included 21 U.S.C. § 845b among the offenses for which "special parole was retained." *Id.* Section 845b, however, which penalizes the use or employment of minors in the commission of drug crimes, is a new offense created by § 1102 of the ADAA; it never provided explicitly for a special parole term. On the other hand, ADAA § 1103(b) adds a mention of the new § 845b to § 841(c), which is the provision defining special parole which was to be repealed as of November 1, 1987, in that subsection's list of statutes under which special parole terms might be imposed. Thus, to avoid rendering ADAA § 1103(b) completely meaningless, it is necessary to read the phrase "supervised release" as "special parole" with respect to § 845b offenses committed prior to November 1, 1987.

the rest of the ADAA's related provisions. As this Court reiterated in *Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana*, 472 U.S. 237 (1985), " 'a statute should be interpreted so as not to render one part inoperative'." *Id.* at 249, quoting *Colautti v. Franklin*, 439 U.S. 379, 392 (1979). Only reading a November 1, 1987, effective date into sections 1002 and 1004 can avoid multiple internal inconsistencies and meaningless penalty language in the ADAA.

For example, 21 U.S.C. § 845, which prohibits distribution of drugs to minors, necessarily retained its requirement for the imposition of special parole terms after 1986, because its penalty provisions were not amended by the ADAA (other than by § 1004). This statute thus required, both before and for a year after the enactment of the ADAA, that the person to be penalized receive "at least twice any special parole term authorized by [21 U.S.C. § 841(b)], for a first offense involving the same controlled substance . . . . " 21 U.S.C. § 845(a). If special parole were replaced by supervised release as of October 27, 1986, for offenses punishable under subsections 841(b)(1)(A), (B), and (C), or any of them, the cross-references of §§ 845(a) and 845(b) demanding at least twice the special parole term provided for in those subsections would be nullified.

Because this construction is unnecessary, it is impermissible. See *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used."). Since the "special parole" language in § 845 unambiguously changed over to "supervised release" as of November 1, 1987, pursuant to ADAA § 1004, inferring a delayed

effective date for all of § 841(b)'s supervised release provisions can preserve the necessary relationship between the two statutes. It is therefore the correct interpretation of ADAA § 1002.

The court of appeals' opinion also overlooks several especially anomalous results of its reading of ADAA § 1004 as applied to 21 U.S.C. § 845a, which penalizes drug distribution within 1000 feet of a school. The penalty for that aggravated offense is also expressed as a multiple of the penalty provided in § 841(b). Section 1104(c) of the ADAA rewrote the penalty clauses of § 845a(b), which is the second offender penalty enhancement provision of § 845a, so as to include, *inter alia*, terms of supervised release, without specifying an effective date. *See also* ADAA § 1866(b) (making different change to § 845a(b) penalty language, but also providing for supervised release). The ADAA made no equivalent change, however, to § 845a(a), the first-offender penalty, which therefore continued to call for "at least twice any special parole term authorized by" § 841(b). Thus, the lower court's reading, as it does with respect to § 845 offenses, would nullify the statute's special parole cross-reference for first offenders under § 845a between October 27, 1986, and November 1, 1987.[11] See *United States v. Levario*, 877 F.2d 1483, 1488 & n.11 (10th Cir. 1989) (recognizing interdependency of § 845a and § 841(b) in this context). Again, this bizarre and inexplicable result can be avoided by the simple technique of construing the changes to 21 U.S.C. § 845a(b), effected by ADAA

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[11] The one exception would be with reference to subsection 841(b)(1)(D), which governs only moderate-size marijuana cases.

§§ 1104(c) and 1866(b), along with the amendments to § 841(b) effected by ADAA § 1002, as being effective November 1, 1987.

Two other aspects of the lower court's interpretation as it affects punishment under 21 U.S.C. § 845a for offenses committed between October 27, 1986, and November 1, 1987, lead to the same conclusion. Section 1866(c) of the ADAA made a change of terminology in § 845a(c)'s statement of parole ineligibility under that statute, but even after the change, subsection 845a(c) allowed parole release after service of a mandatory minimum term of imprisonment. Thus, the changes in § 845a effected by the ADAA plainly contemplate parolability on such sentences, even for offenses committed after October 27, 1986. Yet parole and supervised release are mutually incompatible concepts in sentencing law. Sections 1104(c), 1866(b) and 1866(c) of the ADAA can only be reconciled if the first two, which deal with supervised release, are understood to have effective dates of November 1, 1987.

The same conclusion flows from awareness of a related statute enacted just two weeks after the ADAA, which also contained an amendment to 21 U.S.C. § 845a. See *New York Telephone Co. v. New York State Dept. of Labor*, 440 U.S. 519, 540-41 (1979) (related statutes considered at same time and passed within weeks of each other construed together); *Sullivan v. Finkelstein*, 496 U.S. ___, 110 L.Ed.2d 563, 578 (June 18, 1990) (Scalia, J., concurring: subsequently enacted statute on same subject is *in pari materia* and "should be interpreted harmoniously"). On November 10, 1986, the President signed the Criminal Law and Procedure Technical Amendments Act of 1986, Pub.L. 99-646, 100 Stat. 6502. Section 28 of that Act

amends § 845a(b) "by inserting 'parole' after '(2) at least three times any special'." This is the very phrase that § 1866(b) of the ADAA replaced with a reference to supervised release. Treating ADAA § 1866(b) as immediately effective thus renders yet another statute nugatory and meaningless. Recognizing an effective date of November 1, 1987, for the transition to supervised release as part of the punishment for violations of § 845a, on the other hand, gives consistent meaning to the two provisions amending the same subsection.

There are other indications in the 1986 Act which support the conclusion that Congress did not intend supervised release to apply to pre-November 1987 offenses. See *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 138 n.11 (1985) (various provisions of same Act should be read *in pari materia*). As 18 U.S.C. § 3583 was originally drafted and enacted as part of the Sentencing Reform Act of 1984 ("SRA"), a violation of the conditions of supervised release was to be treated as a contempt of court. Sentencing Reform Act of 1984, Pub.L. 98-473, § 212(a)(2), 98 Stat. 1999, establishing 18 U.S.C. § 3583(e)(3). Section 1006(a)(3) of the ADAA, however, added a provision for revocation of supervised release, to be administered under the Federal Rule of Criminal Procedure governing revocation of probation and in accordance with U.S. Sentencing Commission policy statements. Under § 1006(a)(4), this amendment to § 3583 was not to be effective until the rest of the SRA came into play. Congress is not likely to have intended that terms of supervised release be imposed for offenses committed

between October 27, 1986, and November 1, 1987, but that these terms could never be revoked.[12]

Likewise, ADAA subsections 1003(a)(1) and (2) make changes to 21 U.S.C. §§ 841(b)(1)(D) and 841(b)(2) without mentioning their special parole provisions or supervised release; thus, a November 1, 1987, changeover pursuant to § 1004 applies to these less serious offenses. Under the lower court's reading of the statute, the supervised release provisions of § 841(b)(1)(D), would go into effect at a different time from those of subsections 841(b)(1)(A), (B) and (C), of which it is a lesser included level of offense. This hardly seems likely to be what Congress intended, especially since ADAA § 1002 has no subsections; it sets out changes to (b)(1)(A), (B), and (C) all as part of same subdivision of the 1986 Act. See *United States v. Morton*, 467 U.S. 822, 828 (1984) ("We do not . . . construe statutory phrases in isolation; we read statutes as a whole."). An analysis that calls for varying effective dates for different subparagraphs within the same section of the statute is certainly less desirable. Where, as here, it can be easily and reasonably avoided, it should be.[13]

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[12] Section 3583, like the rest of the SRA, is not applicable to any offense committed before November 1, 1987. SRA § 235(a)(1); Sentencing Act of 1987, Pub.L. 100-182, § 2(a), 101 Stat. 1266. The unwieldy alternative of holding a supervised-release violator in contempt was repealed effective November 18, 1988, and the revocation clause accordingly renumbered from (e)(4) to (e)(3). Pub.L. 100-690, § 7108, 102 Stat. 4418.

[13] This same conclusion applies equally to the analysis of those circuits which have held that ADAA § 1002's provision for supervised release under 21 U.S.C. § 841(b)(1)(A) went into

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In short, the sentencing regime created by the result reached below is internally highly inconsistent. This Court has often stated that it will not accord to Congress an intention to create absurd results, absent clear statutory language compelling that result, *United States v. Turkette*, 452 U.S. 576, 580 (1981), and perhaps even despite such language. The Court has likewise recognized that "internal inconsistencies in the statute must be dealt with." *Id. United States v. Turkette*, 452 U.S. 576, 580 (1981) Even "the 'plain meaning' rule [must] give way where its application would produce a futile result, or an unreasonable result 'plainly at variance with the policy of the legislation as a whole.' " *Shapiro v. United States*, 335 U.S. 1, 31 (1948) (source of quotation omitted). See also *United States v. Albertini*, 472 U.S. 675, 697 (1985) (Stevens, J., dissenting) ("No rule of construction requires that we attribute to Congress an intent which is at odds with its own design and which results 'in patently absurd consequences . . . ' [citation omitted]"). The only reasonable construction of the ADAA's silence as to the effective date of the mandatory terms of supervised release that it creates is to find that they all became effective for offenses committed on or after November 1, 1987.

2. None of the innovative penalty provisions of the ADAA can sensibly be read as applying to pre-November 1987 offenses.

Just as a reading *in pari materia* of all of the sections of the ADAA dealing with supervised release shows that

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effect immediately, while the transition under subsections (b)(1)(B) and (C) were delayed to November 1, 1987. *E.g., United States v. Figueroa*, 898 F.2d 825 (1st Cir. 1990).

the provisions for supervised release in § 1002 were not effective prior to November 1, 1987, so the same conclusion follows from an analysis of § 1002's provisions abolishing parole and establishing mandatory minimum terms of imprisonment. Thus, the supervised release provisions established in § 1002 did not apply to the petitioner's offense, committed in February 1987, for the additional reason that § 1002 as a whole had not yet become effective at that time.[14]

The revision of 21 U.S.C. § 841(b) effected by § 1002 of the ADAA not only mandated terms of supervised release but also created mandatory minimum sentences of imprisonment for offenses punishable under the newly-redefined 21 U.S.C. §§ 841(b)(1)(A) and (B). Under these provisions, probation and suspension of sentence are forbidden; parole is also abolished. Petitioner Gozlon was charged with such offenses in counts 3 and 2 respectively. Other sections of the ADAA created mechanisms to encourage accused persons to cooperate with the authorities in order to avoid the mandatory minimums created

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[14] The petitioner did not challenge below or in his petition for certiorari the effectiveness as of the date of his offenses of the ADAA's provisions for mandatory minimum sentences or abolishing parole. Accordingly, he advances this argument before this Court, as stated in the text above, solely as a basis for answering the question presented in his favor. Nevertheless, this Court has the power, which the petitioner would urge it to exercise, to vacate the sentences on Counts 2 and 3 generally, on the ground that an illegal sentence, or one imposed under a fundamental misapprehension of the governing law, is plain error under this Court's Rule 24.1(a). See *Bozza v. United States*, 330 U.S. 160, 166-67 (1947).

by § 1002, *see* ADAA §§ 1007(a),[15] 1009(a),[16] but those ameliorative sections by their terms are not applicable to offenses committed before November 1, 1987. *Id.* §§ 1007(b), 1009(b). As sections of the same Act dealing with the same subject matter, §§ 1007 and 1009 should be construed *in pari materia* with the mandatory minimum sentence provisions of § 1002. *Sullivan v. Everhart*, 494 U.S. ___, 108 L.Ed.2d 72, 82 (Feb. 21, 1990); see also *United States v. Morton*, 467 U.S. 822, 828 (1984).

If § 1002 was effective immediately, those sentenced for crimes committed between October 27, 1986, and November 1, 1987, could never receive waivers of the mandatory minimum sentencing provisions, while later offenders could. Congress could not rationally have intended to enact mandatory minimum terms by means of ADAA § 1002, effective immediately, subject to no exceptions, and in the same Act and at the same time provide that these minimums might be waived, on

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[15] ADAA § 1007(a) added a new provision to the Sentencing Reform Act, 18 U.S.C. § 3553(e), authorizing a judge at the time of sentencing, upon motion of the government, "to impose a sentence below a level established by statute as [a] minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." See also *id.* § 1008 (calling upon Sentencing Commission to promulgate guidelines to implement § 3553(e)).

[16] The SRA, as enacted in 1984, contained a provision, § 215(b), which created a new text for Fed.R.Crim.P. 35(b), effective November 1, 1987, allowing a sentence to be reduced within one year after imposition upon government motion disclosing substantial assistance to the authorities. ADAA § 1009(a) amended that provision to permit such a reduction to result in a sentence below an otherwise applicable mandatory minimum.

motion of the government reporting the defendant's substantial cooperation with the authorities – but only for cases arising more than 12 months later.[17] *United States v. Preston*, 1990 WestLaw 80690 (W.D.Va., filed May 31, 1990) (Crim. No. 87-85, typed op. at 2-13); see also *Hernandez Rivera v. United States*, 719 F.Supp. 65, 66 (D.P.R. 1989). To avoid this patently unfair and implausible result, all of § 1002 should be construed as having an effective date of November 1, 1987, to comport with §§ 1007 and 1009.

This reading of the 1986 Act, delaying the effective date of all the amendments to various penalty sections, is further supported by the terms of ADAA § 1102, creating 21 U.S.C. § 845b, a new offense prohibiting, *inter alia*, the employment or use of persons under the age of 18 to violate a controlled substances law, which bears an enhanced penalty expressed as a multiple of that provided in § 841(b). Subsection 845b(e) creates a unusual form of mandatory minimum, based on the existing "school yard statute," 21 U.S.C. § 845a(c), and different from that established under any of the other ADAA amendments, which allows parole release after service of a minimum sentence. Since all parole was to be abolished

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[17] Congress may have attempted to remedy this anomaly in the Sentencing Act of 1987, Pub.L. 100-182, § 24, 101 Stat. 1271, which extends the benefits of 18 U.S.C. § 3553(e) and "new" Rule 35(b) to "offense[s] committed before the taking effect of [the new sentencing] guidelines." The same Act also provides, however, that "The amendments made by this Act shall apply with respect to offenses committed after the enactment of this Act." *Id.* § 26. It thus seems that Congress is no less likely to create ambiguities and contradictions when it does articulate effective date provisions than when it does not.

for offenses committed on or after November 1, 1987, this new offense must have an immediate effective date.[18] *Cf. Warden v. Marrero*, 417 U.S. 653 (1974) (considering problems arising out of 1970 drug sentencing conversion from nonparolable to parolable sentences). The nonparolable penalty provisions created by § 1002, by contrast, are all of the type that was to exist under the SRA,[19] with no internal indication of immediate effectiveness other than the general canon. They should thus be deemed effective with the SRA, not immediately upon enactment.

Construction of these other provisions of the ADAA *in pari materia* with § 1002 shows that the entire section, necessarily including its provisions for supervised release, did not go into effect until November 1, 1987.

3. The policy behind the change from special parole to supervised release was sentencing reform, not drug penalty enhancement.

Inferring an immediate effective date for the ADAA's supervised release provisions is not necessary to carry out any Congressional policy with respect to sentencing in controlled substances cases. *Cf. Bifulco v. United States*, 447 U.S. 381, 387, 399-401 (1980) (examining motivating

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[18] Section 845b(b) includes supervised release among the penalties to be imposed for a violation of § 841b(a). Because there is no prior version of § 845b calling for special parole, the question whether that supervised release provision was intended to be effective immediately is quite similar to that involved in the petitioner's case, arising under § 841(b)(1)(A). *But see* footnote 10 above.

[19] All of the offenses created by ADAA § 1002 that carry mandatory minimums explicitly bar parole for the full term of the maximum sentence imposed. *See* J.A. 38; *United States v. Levy*, 865 F.2d 551, 559 (3d Cir. 1989) (in banc).

policies of the Comprehensive Drug Abuse Prevention and Control Act in aid of determining Congress's intent as to whether special parole term was authorized as part of punishment for drug conspiracy offense); accord, *e.g.*, *Barrett v. United States*, 423 U.S. 212, 217-19 (1976). Two rationales appear to underlie the various drug penalty amendments of 1986: (1) the enhancement of available punishments, and (2) refinement of the pending process of sentencing reform. The addition of supervised release in place of special parole as part of the penalty for controlled substance offenses in the ADAA furthered the policy of sentencing reform rather than sentence enhancement, as supervised release is not an inherently more severe penalty than special parole.

The characteristics of special parole, a novel form of enhanced and extended post-incarceration supervision unique to controlled substances cases under pre-Sentencing Reform Act law, were (in part) described in 21 U.S.C. § 841(c).[20] A special parole term is an additional, consecutive period of parole following an offender's release from prison and service of the balance of his or her maximum term under parole supervision. It is administered and supervised by U.S. Probation Officers on behalf of the U.S. Parole Commission. 28 C.F.R. §§ 2.38, 2.57 (1989). *See also* 18 U.S.C. § 3655 (1982) (6th para.). If an offender violates its terms, special parole may be revoked, in which event the entire specified term is added to the full maximum of the underlying sentence and the parolee is

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[20] *See also* 21 U.S.C. § 960(c), as created by the 1970 Act, establishing special parole terms as part of the punishment for criminal violations of the Controlled Substances Import and Export Act.

returned to prison to complete service of that extended maximum, subject to possible reparole.

True, the minimum length of any mandatory term of supervised release in a controlled substances case is somewhat longer than the comparable minimum special parole term, and the statute allows a term to be extended while it is being served. 18 U.S.C. § 3583(e)(2). And if supervised release is revoked, there is no provision in the law for rerelease, whereas a prisoner serving a revoked special parole term may be paroled again. 28 C.F.R. § 2.57(c,d) (1989). On the other hand, special parole terms have no specified maximum, and the courts have therefore uniformly held that in appropriate cases special parole may continue for life. See *In re Whittenburg*, 680 F.Supp. 1160, 1161 (S.D.Oh. 1987) (collecting cases). It is not settled whether the mandatory terms of supervised release in controlled substances cases are limited by the statute which caps them at five years, 18 U.S.C. § 3583(b).

Moreover, even if the initial term imposed is the same, a special parole term, once revoked, may result in longer incarceration than a revoked term of supervised release. This is because when special parole is revoked, the total term is *added* to the unserved portion of the underlying term of imprisonment and the prisoner may then face up to the total unserved balance with no requirement that s/he be reparoled, 21 U.S.C. §§ 841(c), 960(c) (prospectively repealed), whereas when supervised release is revoked, only that term is served, subject to a three year cap except in potential life-sentence cases. 18 U.S.C. § 3583(e)(3) (referring to classification of offenses found in *id.* § 3559).

Since supervised release is not necessarily a harsher sanction than special parole, it appears that Congress

more likely thought it was fostering and advancing its scheme of sentencing reform than that it was enhancing maximum sentences when it substituted supervised release for special parole in the final changes to the 1986 Act. The replacement of parole, including special parole, with supervised release was part of that reform. S.Rep. No. 98-225, 98th Cong., 1st Sess. 122-25 (1983); Slawsky, "Looking at the Law," 53 Fed.Prob. 69, 69-70 (June 1989). In order to further that policy, the supervised release provisions would have to have become effective when sentencing reform became effective: November 1, 1987.

An understanding of this policy rationale undercuts the court of appeals' suggestion that Congress must at least have intended supervised release to become effective for sentences imposed for post-ADAA conduct, such as petitioner Gozlon's, which would have come under the prior version of 21 U.S.C. § 841(b)(1)(A) and thus not be subject in the interim to a special parole term. Congress was certainly cognizant that the same Parole Commission that would have to administer any special parole terms imposed as part of a sentence for an offense committed between October 1986 and November 1987 was due to be phased out in 1992. *See* SRA § 235(b)(1)(A). That is before many such terms would even have begun, given the lengthy prison sentences being mandated in the 1986 legislation. Thus, Congress may well have enacted the new sentencing provisions with the understanding that some of them, at least, would not be able to become effective until the rest of the delayed sentencing reform came into being on November 1, 1987.

The existence of such gaps is not new in connection with revisions of criminal statutes; the proper judicial response is not to reach out for a "correction" but rather

to exercise restraint. Out of respect for a co-equal branch of government, this Court should not conclude, unless there is no other explanation, that the inclusion of supervised release as part of the 1986 amendments was simply a failure of clear thinking in the legislative process.

> Particularly in the administration of criminal justice, a badly drawn statute places strains on judges. . . . The temptation to exceed our limited judicial role and do what we regard as the more sensible thing is great, but it takes us on a slippery slope. Our duty, to paraphrase Mr. Justice Holmes in a conversation with Judge Learned Hand, is not to do justice but to apply the law and hope that justice is done.

Bifulco, supra, 447 U.S. at 401-02 (Burger, C.J., concurring) (citations omitted). In this case, Congress must be deemed to have understood and accepted that a year's delay in implementing its penalty changes was part and parcel of phasing out a doomed and obsolete form of sentencing, rather than perpetuate it. This conclusion becomes all the more clear when the October 1986 penalty amendments are viewed as part of a continuing process of statutory revision and in conjunction with the related provisions of the Sentencing Reform Act, passed in 1984, but not due to become effective until November 1, 1987.

B. The History of Controlled Substances Penalty Reform and the Legislative History of the 1986 Amendments.

The history of the enactment of § 1002 of the 1986 ADAA-NPEA, while essential for understanding how the question presented in this case came to arise at all, is helpful in resolving that question only to a limited degree. *Cf. Taylor v. United States*, 495 U.S. ___, 109

L.Ed.2d 607, 616-22 (May 29, 1990); see *id.* at 630 (Scalia, J., concurring). Understanding the history may be helpful, for example, in deducing the policy choices that Congress sought to implement in this law. Reviewing the history may also assist in ascertaining the prior law and thus in resolving what sentencing provisions do apply to offenses committed in the year between October 27, 1986, and November 1, 1987, the period when § 1002 and similar provisions of the ADAA were on the statute books but not yet effective.

1. History of controlled substances penalty reform.

Sections 841(a) and (b) of Title 21 Sections 841(a) and (b) of Title 21, United States Code, were created in 1970 by the Controlled Substances Act, Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236, 1261-62. Subsection 841(a)(1) criminalized the manufacture or distribution (or possession with intent to do either of these) of controlled substances as defined in a five-part drug identification scheme which listed the various drugs in schedules. Section 841(b)(1)(A) provided the penalties for violations of subsection (a)(1) involving "narcotic drugs," a term defined to include heroin and cocaine.[21] As part of the punishment in every case, the 1970 statute required a "special parole term" of at least a specified number of years, up to an unstated maximum. See generally *Bifulco v. United States*, 447 U.S. 381 (1980).

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[21] Section 841(b)(1)(B) contained the penalties for non-narcotic drugs including marijuana.

On October 12, 1984, the President signed into law the Comprehensive Crime Control Act of 1984 ("CCCA"), Pub. L. No. 98-473, 98 Stat. 1837. Two chapters or titles of the CCCA are pertinent here: Chapter V, called the Controlled Substances Penalties Amendments Act of 1984 ("CSPAA"), and Chapter II, the Sentencing Reform Act ("SRA"). Section 502(1) of the CSPAA, 98 Stat. 2068, amended 21 U.S.C. § 841(b) by dividing the penalties for domestic controlled substance possession, distribution and manufacturing offenses into two subsections, based on the quantity of drugs involved. The CSPAA thus created a new § 841(b)(1)(A) for higher volume cases like petitioner's,[22] which, *inter alia*, increased the maximum penalty of imprisonment from 15 years to 20. Section 841(b)(1)(A), as amended in 1984, no longer provided for a special parole term as part of the applicable penalty, although subsections (b)(1)(B) and (C) retained such terms.

Chapter II of the CCCA, the Sentencing Reform Act of 1984 ("SRA"), provided for radical changes in all federal criminal sentencing. See generally *Mistretta v. United States*, 488 U.S. 361 (1989). The new system of limited discretion, controlled by guidelines and policy statements to be developed by a permanent commission and subject to appellate review, also called – among many other changes – for abolition of parole. An entirely new form of post-confinement monitoring was introduced, called

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[22] The new § 841(b)(1)(A), as amended in 1984, applied, *inter alia*, to heroin offenses involving 100 grams or more, and to cocaine offenses of a kilogram or more. A new § 841(b)(1)(B) pertained to smaller-scale heroin and cocaine offenses and 50-kilogram-or-more marijuana offenses.

"supervised release." Unlike parole (or special parole) a prisoner would not be subject to "supervised release" in every case, for a period of time defined by the unserved portion of the prison sentence. Instead, judges were to decide at the time of sentencing which defendants appeared to need such supervision upon release and to provide for it, in appropriate cases, with a term of stated length, to be administered by the court itself. A violation of the conditions of supervised release would not result in revocation, but rather would be treated as a contempt. These provisions were to be codified, as of the effective date of the Sentencing Reform Act, in 18 U.S.C. § 3583.

In connection with the abolition of regular parole, § 224(a) of the SRA also contained a provision deleting all provisions for special parole terms. 98 Stat. 1987, 2030. Like the rest of the SRA, this provision initially stated that it would become effective on the first day of the first month more than two years after passage (and provided that certain other conditions had been satisfied by that date), that is, on November 1, 1986, SRA § 235(a)(1), but Congress later delayed the effective date until November 1, 1987. Sentencing Reform Amendments Act of 1985, Pub.L. 99-217, § 4, 99 Stat. 1728.

Congress spoke again on sentencing in controlled substances cases in 1986, when it passed the NPEA and related provisions of the Anti-Drug Abuse Act. Section 1002 of the ADAA once more redefined § 841(b)'s penalty categories. The newly-reframed subsection 841(b)(1)(A), as amended in 1986, contained the penalties for offenses involving, *e.g.*, one kilogram or more of heroin, five kilograms or more of cocaine, and at least 1000 kilograms of marijuana. Subsection (b)(1)(B), in its new 1986 version, applied to, among others, offenses involving 100 grams or

more of heroin, 500 grams or more of cocaine, or 100 kilograms or more of marijuana. Subsection (b)(1)(C), as amended, pertained to offenses involving any smaller amounts of each drug (with the exception of less-than-50-kilogram marijuana cases, covered in section 841(b)(1)(D), which was not amended by the ADAA). As enacted, section 1002 (amending 21 U.S.C. §§ 841(b)(1)(A), (B), and (C)) provided, *inter alia*, for mandatory terms of supervised release as part of those sentences.[23]

2. Legislative history of the 1986 penalty amendments.

The history of the 1986 legislation reveals that Congress's inclusion of the words "supervised release" in § 1002 of the ADAA came late in the reconciliation process. The somewhat different bills which had initially passed each House of Congress both contained provisions for special parole terms in their penalty reform sections, with a transition to supervised release to occur when the new SRA scheme came into being. No direct explanation exists in the available sources of legislative history why the final bill to be enacted provided instead for supervised release in the language of § 1002. Thus, one of two explanations seems to be required: either there was an error of drafting in the course of final revisions, or Congress decided at the last minute, without stated

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[23] The process of sentencing revision and reform did not stop with the ADAA in 1986. Pertinent excerpts from the Criminal Law and Procedure Technical Amendments Act of 1986, the Sentencing Act of 1987, the 1988 anti-drug act, and others are referred to in this Brief where appropriate.

explanation, not to reinstate special parole for most controlled substance offenses when that form of post-release supervision was due to be abolished in about one year anyway.

As the First Circuit reported in detail in its decision in *United States v. Ferryman*, 897 F.2d 584, 586-87 (1990), the bill that eventually became the Narcotics Penalties and Enforcement Act of 1986[24] was introduced in the House of Representatives on September 8, 1986, as H.R. 5484. This bill, which passed the House on September 11, 1986, contained mandatory special parole terms as part of the penalty for all categories of heroin and cocaine offenses. *See* 132 Cong.Rec. H6459 (daily ed. Sept. 8, 1986); H6608-6611; 6628-32 (daily ed. Sept. 11, 1986).

Subsection (b) of section 608 of the bill, entitled "Conforming Prospective Amendments," would have deleted the special parole terms from the applicable penalty provisions respecting heroin, cocaine, and marijuana offenses, effective on the date that § 224 of the Comprehensive Crime Control Act of 1984 (part of the Sentencing Reform Act of 1984, making conforming amendments to the Controlled Substances Act) was to become effective. Additionally, a House Report concerning the bill described the amendments eliminating the special parole terms as "conforming prospective amendments to repeal the provisions authorizing special parole terms when the new Federal sentencing laws take effect." H.Rep. No. 845, 99th Cong., 2d Sess. 20 (1986). The bill did not specify an effective date for the penalty provisions. Nevertheless,

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[24] Subtitle A of Title I (Anti-Drug Enforcement) of the ADAA, §§ 1001-1009, 100 Stat. 3207, 3207-2 through 3207-8 (1986).

this history shows that the House of Representatives initially intended the ADAA to revise and recodify all the major controlled substances penalty provisions, as a result of which all would contain special parole terms applicable to all offenses until the Sentencing Reform Act of 1984 became effective: November 1, 1987.

A few days after H.R. 5484 was passed, the President submitted to Congress a partially different version of an Act that also enhanced penalties for drug offenses. *Ferryman, supra,* 897 F.2d at 587 (*citing* 22 Comp.Pres.Doc. 1192-1194 (Sept. 15, 1986)). The Administration's version, which was introduced in the Senate as S. 2878, *see* 132 Cong. Rec. S13648-52 (daily ed. Sept. 25, 1986); S15205 (daily ed. Oct. 6, 1986), also provided for mandatory terms of special parole for heroin, cocaine, and other serious drug offenses. *Id.* See *Ferryman, supra,* at 587 (noting that Section 507 of Administration's proposal stated that, upon the date that sentencing reform became effective (November 1, 1987), 'special parole term[s]' would be supplanted by 'term[s] of supervised release.') On September 30, 1986, the Senate passed S. 2878 and returned it to the House. *See* 132 Cong. Rec. S13779 (daily ed. Sept. 26, 1986); S 14302 (daily ed. Sept. 30, 1986).

The House concurred in the Senate amendment to H.R. 5484, but with certain pertinent further amendments, and resubmitted it to the Senate. *See* 132 Cong. Rec. H9479-84 (daily ed. Oct. 8, 1986). As in the Senate's version (S. 2878), this House version included a section designated § 1002, which revised the penalty provisions and included mandatory special parole terms for the serious offenses; thus, both houses had then passed versions of the bill reestablishing special parole, not supervised release, as part of the penalty to be effective until

November 1, 1987. This penultimate House version placed the changeover provision from special parole to supervised release in section 1004; it had appeared in section 1007 in previous versions of the bill. The Senate passed the bill received from the House, with certain amendments not relevant here, on October 15, 1986. *See* 132 Cong. Rec. S16489, 16502 (daily ed. Oct. 15, 1986). No amendment was proposed or added changing the special parole terms provided to terms of supervised release.

In the Act's "final rush to passage," *Ferryman, supra,* 897 F.2d at 587,[25] between October 15 and 17, 1986, the words "supervised release" were for the first time inserted in place of "special parole" in certain parts of section 1002 of the Act, with no explanation. The transition provision of § 1004, however, was not changed. *See* 132 Cong. Rec. H 11219-22 (daily ed. Oct. 17, 1986). The House and Senate finally both approved the bill in this form. *See* 132 Cong. Rec. H10777, 10787, S16915, 16921 (daily ed. Oct. 17, 1986). The President signed the ADAA on October 27, 1986.

Because Congress did not offer any explanation for its eleventh hour substitution of the words "term of supervised release" for "special parole term," its actual reasons for doing so are unknown. It may well be that the law that applied to the petitioner at sentencing "is not the product of model legislative deliberation or draftsmanship." *Scarborough v. United States,* 431 U.S. 536, 570

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[25] *See also* 132 Cong. Rec. S. 16489 (daily ed. Oct. 15, 1986) (comments by Senator Dole concerning the Senate's desire to "try to reach some agreement on this antidrug bill so we could pass it, get it back to the House, and make certain we have a drug bill this year[]"; seeking consent that only a few amendments be permitted to be offered to H.R. 5484).

(1977). But even a " 'last-minute' floor amendment, 'hastily passed, with little discussion, no hearings, and no report,' " is entitled to be enforced according to its terms as statutory law, not disregarded, disparaged, or judicially rewritten. *United States v. Batchelder*, 442 U.S. 114, 120 (1979), quoting *United States v. Bass*, 404 U.S. 336, 344 (1971), and *Scarborough, supra*, 431 U.S. at 569.

Parts A.1. and 2. of this Brief have already shown that the language of the Act as a whole requires its supervised release provisions to become effective only on November 1, 1987. In the absence of clear evidence that the change was the result of a mistake, this Court simply must presume that Congress intended to do what it did. *Cf. Bifulco v. United States, supra*, 447 U.S. at 390 n.8 (viewing as an "assum[ption]" government's explanation of statutory anomaly as "carelessness in draftsmanship" and expressing reluctance to accept it). Such a presumption in this case yields a delayed effective date for all supervised release provisions of November 1, 1987, a result which is also more consistent with the impending implementation of the 1984 Sentencing Reform Act.

C. The Scheme of Sentencing Reform: the 1986 ADAA Must Be Construed "in Pari Materia" with the 1984 Sentencing Reform Act.

The expression "supervised release," when included in § 1002 of the Anti-Drug Abuse Act in October 1986, had no known meaning in federal sentencing law, other than as a reference to a novel form of court-imposed and court-controlled supervision created by the Sentencing Reform Act of 1984 and not due to become effective until November 1, 1987, at the earliest. Section 212(a)(2) of the SRA created a new 18 U.S.C. § 3583(d), which sets forth

the conditions a court shall, and in some cases may, impose on a person subject to supervised release. Those conditions are, in several instances, defined or set forth in other sections of the SRA. Section 3583(c) likewise establishes factors, by reference to other provisions of the SRA, which a court must consider when imposing a term of supervised release or in selecting its length. The maximum length of terms of supervised release was set in § 3583(b), with the limit for a Class B felony (such as controlled substance offenses punishable under 21 U.S.C. § 841(b)(1)(A), (B) or (C), as amended in 1986)[26] of no more than three years.[27] As statutes which "share a common purpose" and deliberately use one another's words, the ADAA and SRA must be construed *in pari materia*. *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979); *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974).

The Sentencing Reform Act, already in place but not yet effective when the ADAA was enacted, had provided in §§ 224-225 a mechanism for the repeal of all special parole provisions at the same time that supervised release would become available to federal judges as a sentencing

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[26] *See* 18 U.S.C. § 3559, as created by the SRA and prior to its post-1986 amendments, establishing letter "classes" of offenses for various purposes, defining a Class B felony as any offense with a maximum punishment of at least 20 years. This has since been amended to read 25 years. Pub.L. 100-690, § 7041, 102 Stat. 4399 (Nov. 18, 1988).

[27] The Sentencing Act of 1987 increased the maximum allowable term of supervised release for a Class B felony from three years to five. Act of Dec. 7, 1987, Pub.L. 100-182, § 8(1), 101 Stat. 1267. Under either version it must be noted that there is an inconsistency between § 3583's provision of a maximum of three years (or even five) and § 841(b)(1)(A)'s requirement of a term of "at least five years."

option. These repealer provisions of the SRA were themselves revoked by ADAA § 1005(a,c) prior to their becoming effective. Instead, ADAA § 1004 essentially took their place by providing instead for a conversion to mandatory supervised release in controlled substances cases.

The inclusion of § 1004 in the ADAA in place of the SRA's former sections 224 and 225 served to implement the 1986 Act's establishment (in § 1002, for example) of mandatory terms of supervised release, where only discretionary power would otherwise have existed, but to make the changeover from special parole at the same time that the general power of judges to impose supervised release would arise, that is, November 1, 1987. That, after all, is when the change could be fully implemented; *i.e.*, the date when supervised release could be imposed as well as carried out, modified or revoked. Section 1004(b) explicitly ties the effective date for the changeover – as to whatever penalty sections it covers – to the time when the implementing definitions and standards of 18 U.S.C. § 3583 were to go into effect, along with the U.S. Sentencing Commission guidelines and policy statements to which § 3583 refers.

All of the pertinent sections of the 1984 SRA defining supervised release and controlling the discretion of judges in implementing it became effective on November 1, 1987. Likewise, these same provisions of § 3583 explicitly incorporate by reference the guidelines and policy statements of the U.S. Sentencing Commission, which likewise did not become effective until November 1987 and did not even exist in final form until six months

before that date. *See* SRA § 235(a)(1)(B); *Mistretta v. United States*, 488 U.S. 361 (1989).

Consistent construction of the ADAA in the context of sentencing reform provides the most fundamental and powerful reason to conclude that all of the ADAA's provisions for mandatory supervised release also went into effect on November 1, 1987. The main point of Congress's establishing a regime of supervised release in place of parole (including special parole), a key aspect of the 1984 sentencing reforms, was to put a final, definite decision about punishment in the hands of the judge at time of sentencing, in the exercise of a strictly guided discretion, and not to leave the matter to later uncertainties. *See* S.Rep. 98-225, 98th Cong., 1st Sess. 123-25 (1983). Thus, the sentencing court must decide the length of the term, as well as the conditions to be applied, at the time of imposition (although the court may modify the conditions later).

By extensive and detailed cross-references in § 3583(c)&(d) to other provisions of the Sentencing Reform Act and its implementing guidelines, Congress made clear that a critical exercise of guided discretion was to occur at the time of imposing supervised release, something that could not be accomplished before the guidelines' final development. Prior to November 1, 1987, no list of lawful conditions existed, much less criteria governing an exercise of discretion as to the length of the term. The absence of such standards is especially important in considering the imposition of a term of supervised release in a controlled substances case, which is arguably exempt from the maximum terms otherwise established by § 3583(b) by virtue of Congress's use of "at least" language in 21 U.S.C. § 841(b)(1) as amended.

Moreover, under the court of appeals' construction of the ADAA, in a significant number of cases judges would, no doubt, have been called upon to implement and enforce supervised release in all its phases prior to November 1987. Under 21 U.S.C. § 841(b)(1)(C), as revised by § 1002 of the ADAA, mandatory terms of supervised release apply to prison sentences that carry no mandatory minimums, for lesser quantities of drugs. In such cases, many defendants could be expected to be released on supervised release before § 3583 became effective to describe what this kind of supervision even meant. If the supervised release provisions of the ADAA were immediately effective, it thus might easily have become necessary to supervise a releasee, modify the conditions of release, or to revoke supervised release before § 3583 even provided for any such procedures.

For all these reasons, examination of the 1986 Act *in pari materia* with related provisions of other sentencing laws lends further strength to the conclusion that the terms of supervised release mandated by the ADAA do not apply to offenses committed before November 1, 1987.

D. The Lower Court's "Error" Theory Contravenes the Rule of Lenity.

The decision below is based, in part, on the assumption that the omission of special parole terms as to "high volume drug offenses" in the 1984 Act was an "error," and that "it is not reasonable to believe that Congress intended to correct a previous error by making the correction effective two years hence." 894 F.2d at 1405; J.A. 50. There is no legislative history of the 1984 Act concerning the revision of § 841(b)(1) that touches on this point. The

history of the 1986 amendments laid out under Point B above suggests that Congress initially was leaning toward restoring special parole in all penalty subsections of 21 U.S.C. § 841(b) as amended by § 1002 of the ADAA, but in the end determined not to do so. Not a word of the 1986 history, however, suggests that Congress was even aware of that precise terms of prior law, much less that it viewed any aspect of its 1984 action as having been in error and that it intended to "correct" it.[28] The presumption, of course, must be the opposite: that Congress intends to do what it did and that it need not state or explain its policy reasons for enacting laws. See *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980) ("[T]his Court has never insisted that a legislative body articulate its reasons for enacting a statute.").

Indeed, as revealed in the careful examination of the legislative history by the First Circuit in *United States v. Ferryman*, 897 F.2d 584, 588-90 (1990), and discussed under Point B above, it is at least as likely that the use of the expression "supervised release" in § 1002 of the 1986 amendments was itself the result of careless drafting rather than of thoughtful policy making, as that the elimination of special parole from (b)(1)(A) cases in 1984 was

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[28] The first court decision to have noted the absence of any provision for special parole in the 1984 version of § 841(b)(1)(A) and thus to have granted a sentence correction on this basis, *United States v. Phungphiphadhana*, 640 F.Supp. 88 (D.Nev. 1986), was not filed until May 22, 1986, and had only just been published in the Federal Supplement Advance Sheets in the issue dated September 29, 1986. It is thus extremely unlikely that Congress could actually have been seeking to "correct" a known "error" in its October 1986 legislation, which commenced with a bill introduced in the House on September 8.

a "mistake." Yet in either event, the words of Congress must be enforced as written in the criminal statute, barring a far more egregious sort of absurdity than is even arguably present here. As this Court has often stated, it is the province of Congress, rather than of the judiciary, to legislate. "If corrective action is needed, it is the Congress that must provide it. 'It is not for us to speculate, much less act, on whether Congress would have altered its stance had the specific events of this case been anticipated.' " *Busic v. United States*, 446 U.S. 398, 405 (1980), quoting *TVA v. Hill*, 437 U.S. 153, 185 (1978); see also *Busic* at 410, quoting *Hill* at 195. This Court would be rewriting the law if it were to approve the imposition of terms of supervised release for offenses such as petitioner's because of an assumption that Congress erred in abolishing special parole in such cases in 1984.

In any event, it is no more illogical (actually, it is a good deal more logical) to delay the effective date of supervised release for a particular class of cases that has not been subject to any comparable supervision requirement for over two years, until a regime for its implementation and enforcement exists, than it was to omit special parole for all drug conspiracy and attempt cases, as this Court found Congress had done and thus enforced in *Bifulco v. United States*, 447 U.S. 381 (1980). This is especially so because there are several plausible explanations for the abolition of special parole in cases sentenced under 21 U.S.C. § 841(b)(1)(A), as amended by the 1984 Crime Control Act. Congress might have thought that prisoners completing longer sentences would already be subject to longer periods of mandatory release supervision under 18 U.S.C. § 4164 (since prospectively repealed), making special parole redundant; or that such

ex-offenders would be incorrigible, making it pointless; or that after serving longer terms this class of violators would be mellowed with age, or more likely rehabilitated.

Of course, it is immaterial whether any of those proposed rationales commends itself to this Court's sense of a sound drug sentencing policy. "Judicial perception that a particular result would be unreasonable may enter into the construction of ambiguous provisions, but cannot justify disregard of what Congress has plainly and intentionally provided." *Comm'r of Internal Revenue v. Asphalt Products Co.*, 482 U.S. 117, 121 (1987) (per curiam). Congress could make any of the judgments suggested in the preceding paragraph – or any number of others – without any requirement that they be expressed in legislative history, and without courts' being entitled to presume that a criminal sentencing provision must be given the more onerous of two interpretations. *Cf. Busic v. United States*, 446 U.S. 398, 408-09 (1980) (rejecting argument for harsher interpretation based on "assumption that . . . Congress' sole objective was to increase the penalties . . . to the maximum extent possible").

Thus, the underlying premise of the court of appeals' "error-correction" theory for interpreting the 1986 Act is severely flawed. Whatever its reason may have been for doing so, Congress in fact abolished special parole terms effective October 12, 1984, for § 841(b)(1)(A) offenses such as petitioner Gozlon's. The court of appeals therefore went astray when it sought to interpret Congress's actions in 1986 by starting from the premise that Congress's 1984 deletion of special parole terms in cases such as the petitioner's was an "error" to be corrected.

Under *Bifulco v. United States, supra,* a court must not assume – as did the court of appeals in this case – that Congress cannot have fully intended the more lenient of two results, even in the context of anti-drug abuse sentencing legislation.[29] It is highly questionable whether the statutes involved here, carefully read as a whole, in light of the policies they foster, and as part of a new sentencing system, are in the final analysis even ambiguous. But if they are, the rule of lenity applies here. The rule of lenity is "an outgrowth of [this Court's] reluctance to increase or multiply punishments absent a clear and definite legislative directive." *Busic v. United States, supra,* 446 U.S. at 406-07. "The rule is also the product of an awareness that legislators and not the courts should define criminal activity" and allowable punishments. *Huddleston v. United States,* 415 U.S. 814, 831 (1974). See also *United States v. Kozminski,* 487 U.S. 931, 952 (1988).

Where the language of the statute, its legislative history, and the other tools of construction still do not clearly and definitely establish Congress's intent, the Court must apply the rule of lenity to choose the least harsh of plausible interpretations of a criminal penalty statute's meaning. " 'This policy of lenity means that the Court will not interpret a federal criminal statute so as to

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[29] It is not because supervised release is inherently a more harsh punishment than special parole that a conclusion of a delayed effective date is more "lenient." That is at best a debatable point. (See discussion above concerning the many differences between the two.) Rather, construing § 1002 as carrying an immediate effective date is more harsh because in a case such as this petitioner's that would have fallen within the bounds of the 1984 revision of § 841(b)(1)(A), there can be no special parole in any event.

increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended.' " *Bifulco, supra,* 447 U.S. at 387 (quoting *Ladner v. United States,* 358 U.S. 169, 178 (1958)). See also, *e.g., Hughey v. United States,* 495 U.S. ___, 109 L.Ed.2d 408, 419 (May 21, 1990); *Tanner v. United States,* 483 U.S. 107, 131-32 (1987); *United States v. Universal C.I.T. Credit Corp.,* 344 U.S. 218, 221-22 (1952). "At the very least," as the Chief Justice has written, where "the issue is subject to some doubt," the Court will "adhere to the familiar rule that, 'where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant.' " *Adamo Wrecking Co. v. United States,* 434 U.S. 275, 284-85 (1978) (quoting *United States v. Bass,* 404 U.S. 336, 348 (1971)).

In *McNally v. United States,* 483 U.S. 350, 359-60 (1987), this Court stated that "when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." The language of the ADAA is neither clear nor definite. As the Court added, "if Congress desires to go further, it must speak more clearly than it has." *Id.* at 360. The same clarity by Congress should be required in the present case.

In this case, for the reasons discussed above, it is not apparent that the argument for an immediate effective date is even "rational." *McNally, supra,* 483 U.S. at 359. Operation of the rule of lenity here provides the final confirmation that supervised release did not come into effect for crimes committed prior to November 1, 1987.

CONCLUSION

For all of these reasons, terms of supervised release may not be imposed as part of the sentence in this case, because the law creating that penalty was not yet effective at the time of commission of the offenses. The judgment of the United States Court of Appeals for the Third Circuit should be affirmed insofar as it vacated the special parole terms imposed on resentencing by the district court, but reversed to the extent that it remanded for imposition of terms of supervised release.

Respectfully submitted,

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August 2, 1990.

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COMPREHENSIVE CRIME CONTROL ACT OF 1984
PUBLIC LAW 98-473
98 STAT. 1987
OCT. 12, 1984

CHAPTER II – SENTENCING REFORM

SEC. 211. This chapter may be cited as the "Sentencing Reform Act of 1984".

SEC. 212. (a) Title 18 of the United States Code is amended by –

(1) redesignating sections 3577, 3578, 3579, 3580, 3611, 3612, 3615, 3617, 3618, 3619, 3620, and 3656 as sections 3661, 3662, 3663, 3664, 3665, 3666, 3667, 3668, 3669, 3670, 3671, and 3672 of a new chapter 232 of title 18 of the United States Code, respectively;

(2) repealing chapters 227, 229, and 231 and substituting the following new chapters:

CHAPTER 227 – SENTENCES

"Subchapter

"SUBCHAPTER A – GENERAL PROVISIONS

"Sec.

"3555. Order of notice to victims.
"3556. Order of restitution.
"3557. Review of a sentence
"3558. Implementation of a sentence.
"3559. Sentencing classification of offenses.

"SUBCHAPTER A – GENERAL PROVISIONS

"§ 3551. Authorized sentences

"(a) IN GENERAL. – Except as otherwise specifically provided, a defendant who has been found guilty of an offense described in any Federal statute, other than an Act of Congress applicable exclusively in the District of Columbia or the Uniform Code of Military Justice, shall be sentenced in accordance with ~~the~~ provisions of this chapter so as to achieve the purposes set forth in subparagraphs (A) through (D) of section 3553(a)(2) to the extent that they are applicable in light of all the circumstances of the case.

"(b) INDIVIDUALS. – An individual found guilty of an offense shall be sentenced, in accordance with the provisions of section 3553, to –

"(1) a term of probation as authorized by subchapter B;

"(2) a fine as authorized by subchapter C; or

"(3) a term of imprisonment as authorized by subchapter D.

A sentence to pay a fine may be imposed in addition to any other sentence. A sanction authorized by section 3354, 3555, or 3556 may be imposed in addition to the sentence required by this subsection.

"(c) ORGANIZATIONS. – An organization found guilty of an offense shall be sentenced, in accordance with the provisions of section 3553, to –

"(1) a term of probation as authorized by subchapter B; or

"(2) a fine as authorized by subchapter C.

A sentence to pay a fine may be imposed in addition to a sentence to probation. A sanction authorized by section 3554, 3555, or 3556 may be imposed in addition to the sentence required by this subsection.

* * *

§ 3553. Imposition of a sentence

"(a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE. – The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –

"(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

"(2) the need for the sentence imposed –

"(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

"(B) to afford adequate deterrence to criminal conduct;

"(C) to protect the public from further crimes of the defendant; and

"(D) to provide the defendant with needed educational or vocational training,

medical care, or other correctional treatment in the most effective manner;

"(3) the kinds of sentences available;

"(4) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1) and that are in effect on the date the defendant is sentenced;

"(5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced; and

"(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.

"(b) APPLICATION OF GUIDELINES IN IMPOSING A SENTENCE. – The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that should result in a sentence different from that described.

"(c) STATEMENT OF REASONS FOR IMPOSING A SENTENCE. – The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence –

"(1) is of the kind, and within the range, described in subsection (a)(4), the reason for imposing a sentence at a particular point within the range; or

"(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described.

If the sentence does not include an order of restitution, the court shall include in the statement the reason therefor. The clerk of the court shall provide a transcription of the court's statement of reasons to the Probation System, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

"(d) PRESENTENCE PROCEDURE FOR AN ORDER OF NOTICE OR RESTITUTION. – Prior to imposing an order of notice pursuant to section 3555, or an order of restitution pursuant to section 3556, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall –

"(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order.

"(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

"(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

* * *

"§ 3559. Sentencing classification of offenses

"(a) CLASSIFICATION. – An offense that is not specifically classified by a letter grade in the section defining it, is classified –

"(1) if the maximum term of imprisonment authorized is –

"(A) life imprisonment, or if the maximum penalty is death, as a Class A felony;

"(B) twenty years or more, as a Class B felony;

"(C) less than twenty years but ten or more years, as a Class C felony;

"(D) less than ten years but five or more years, as a Class D felony;

"(E) less than five years but more than one year, as a Class E felony;

"(F) one year or less but more than six months, as a Class A misdemeanor;

"(G) six months or less but more than thirty days, as a Class B misdemeanor;

"(H) thirty days or less but more than five days, as a Class C misdemeanor; or

"(I) five days or less, or if no imprisonment is authorized, as an infraction.

"(b) EFFECT OF CLASSIFICATION. – An offense classified under subsection (a) carries all the incidents assigned to the applicable letter designation except that:

"(1) the maximum fine that may be imposed is the fine authorized by the statute

describing the offense, or by this chapter, whichever is the greater; and

"(2) the maximum term of imprisonment is the term authorized by the statute describing the offense.

* * *

"SUBCHAPTER D – IMPRISONMENT

"SUBCHAPTER D – IMPRISONMENT

* * *

§ "3583. Inclusion of a term of supervised release after imprisonment

"(a) IN GENERAL. – The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment.

"(b) AUTHORIZED TERMS OF SUPERVISED RELEASE. – The authorized terms of supervised release are –

"(1) for a Class A or Class B felony, not more than three years;

"(2) for a Class C or Class D felony, not more than two years; and

"(3) for a Class E felony, or for a misdemeanor, not more than one year.

"(c) FACTORS TO BE CONSIDERED IN INCLUDING A TERM OF SUPERVISED RELEASE. – The court, in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release, shall consider the factors set forth in section 3553 (a)(1), (a)(2)(B), (a)(2)(D), (a)(4), (a)(5), and (a)(6).

"(d) CONDITIONS OF SUPERVISED RELEASE. – The court shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime during the term of supervision. The court may order, as a further condition of supervised release, to the extent that such condition –

"(1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), and (a)(2)(D);

"(2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B) and (a)(2)(D); and

"(3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a); any condition set forth as a discretionary condition of probation in section 3563(b)(1) through (b)(10) and (b)(12) through (b)(19), and any other condition it considers to be appropriate. If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation.

"(e) MODIFICATION OF TERM OR CONDITIONS. – The court may, after considering the factors set forth in section 3553 (a)(1), (a)(2)(B), (a)(2)(D), (a)(4), (a)(5), and (a)(6) –

"(1) terminate a term of supervised release previously ordered and discharge the person released at any time after the expiration of one year of supervised release, if it is satisfied that such action is warranted by the conduct of the person released and the interest of justice;

"(2) after a hearing, extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, pursuant to the provisions applicable to the initial setting of the terms and conditions of post-release supervision; or

"(3) treat a violation of a condition of a term of supervised release as contempt of court pursuant to section 401(3) of this title.

"(f) WRITTEN STATEMENT OF CONDITIONS. – The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

* * *

SEC. 215. The Federal Rules of Criminal Procedure are amended as follows:

(a) Rule 32 is amended –

* * *

(b) Rule 35 is amended to read as follows:

"Rule 35. Correction of Sentence

"(a) CORRECTION OF A SENTENCE ON REMAND. – The court shall correct a sentence that is determined on appeal under 18 U.S.C. 3742 to have been imposed in violation of law, to have been imposed as a result of an incorrect application of the sentencing guidelines, or to be unreasonable, upon remand of the case to the court –

"(1) for imposition of a sentence in accord with the findings of the court of appeals; or

"(2) for further sentencing proceedings if, after such proceedings, the court determines that the original sentence was incorrect.

"(b) CORRECTION OF SENTENCE FOR CHANGED CIRCUMSTANCES. – The court, on motion of the Government, may within one year after the imposition of a sentence, lower a sentence to reflect a defendant's subsequent, substantial assistance in the investigation or prosecution of another person who has committed an offense, to the extent that such assistance is a factor in applicable guidelines or policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a).".

(c) Rule 38 is amended –

* * *

(d) Rule 40 is amended

* * *

(e) Rule 54 is amended

* * *

(f) Rule 6(e)(3)(C) is amended

* * *

(g) The Table of Rules that precedes Rule 1 is amended as follows:

(1) The item relating to Rule 35 is amended to read as follows:

"35. Correction of Sentence.

"(a) Correction of a sentence on remand.

"(b) Correction of a sentence for changed circumstances.".

(2) The item relating to Rule 38 is amended to read as follows:

"38. Stay of Execution.

"(a) Death.

"(b) Imprisonment.

"(c) Fine.

"(d) Probation.

"(e) Criminal forfeiture, notice to victims, and restitution.

"(f) Disabilities.".

* * *

SEC. 224. The Controlled Substances Act (21 U.S.C. 801 et seq.) is amended as follows:

(a) Section 401 (21 U.S.C. 841) is amended –

(1) in subsection (b)(1)(A), by deleting the last sentence;

(2) in subsection (b)(1)(B), by deleting the last sentence;

(3) in subsection (b)(2), by deleting the last sentence;

(4) in subsection (b)(4), by deleting "subsections (a) and (b) of" and by adding "and section 3607 of title 18, United States Code" after "404";

(5) in subsection (b)(5), by deleting the last sentence; and

(6) by repealing subsection (c).

(b) Section 405 (21 U.S.C. 845) is amended–

(1) in subsection (a), by deleting "(1)" the second place it appears, and by deleting ", and (2) at least twice any special parole term authorized by section 401(b), for a first offense involving the same controlled substance and schedule"; and

(2) in subsection (b), by deleting "(1)" the second place it appears, and by deleting ", and (2) at least three times any special parole term authorized by section 401(b), for a second or subsequent offense involving the same controlled substance and schedule".

(c) Section 408(c) (21 U.S.C. 848(c)) is amended by deleting "and section 4202 of title 18 of the United States Code".

SEC. 225. The Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.) is amended as follows:

(a) Section 1010 (21 U.S.C. 960) is amended–

(1) in subsection (b)(1), by deleting the last sentence;

(2) in subsection (b)(2), by deleting the last sentence; and

(3) by repealing subsection (c).

(b) Section 1012(a) (21 U.S.C. 962(a)) is amended by deleting the last sentence.

* * *

EFFECTIVE DATE

SEC. 235. (a)(1) This chapter shall take effect on the first day of the first calendar month beginning twenty-four months after the date of enactment, except that–

(A) the repeal of chapter 402 of title 18, United States Code, shall take effect on the date of enactment;

(B)(i) chapter 58 of title 28, United States Code, shall take effect on the date of enactment of this Act or October 1, 1983, whichever occurs later, and the United States Sentencing Commission shall submit the initial sentencing guidelines promulgated to section 994(a)(1) of title 28 to the Congress within eighteen months of the effective date of the chapter; and

(ii) the sentencing guidelines promulgated pursuant to section 994(a)(1), and the provisions of sections 3581, 3583, and 3624 of title 18, United States Code, shall not go into effect until the day after–

(I) the United States Sentencing Commission has submitted the initial set of sentencing guidelines to the Congress pursuant to subparagraph (B)(i), along with a report stating the reasons for the Commission's recommendations;

(II) the General Accounting Office has undertaken a study of the guidelines, and their potential impact in comparison with the operation of the existing sentencing and

parole release system, and has, within one hundred and fifty days of submission of the guidelines, reported to the Congress the results of its study; and

(III) the Congress has had six months after the date described in subclause (I) in which to examine the guidelines and consider the reports; and

(IV) the provisions of sections 227 and 228 shall take effect on the date of enactment.

* * *

CHAPTER V – DRUG ENFORCEMENT AMENDMENTS

PART A – CONTROLLED SUBSTANCES PENALTIES

SEC. 501. This chapter may be cited as the "Controlled Substances Penalties Amendments Act of 1984".

SEC. 502. Subsection (b) of section 401 of the Controlled Substances Act (21 U.S.C. 841(b)) is amended–

(1) in paragraph (1), by–

(A) redesignating subparagraphs (A) and (B) as subparagraphs (B) and (C), respectively, and inserting after "(1)" a new subparagraph to read as follows:

"(A) In the case of a violation of subsection (a) of this section involving–

"(i) 100 grams or more of a controlled substance in schedule I or II which is a mixture or substance containing a detectable amount of a narcotic drug other than a narcotic drug consisting of–

"(I) coca leaves;

"(II) a compound, manufacture, salt, derivative, or preparation of coca leaves; or

"(III) a substance chemically identical thereto;

"(ii) a kilogram or more of any other controlled substance in schedule I or II which is a narcotic drug;

"(iii) 500 grams or more of phencyclidine (PCP); or

"(iv) 5 grams or more of lysergic acid diethylamide (LSD); such person shall be sentenced to a term of imprisonment of not more than 20 years, a fine of not more than $250,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this title or title III or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 40 years, a fine of not more than $500,000, or both";

(B) in subparagraph (B), as redesignated above, by–

(i) striking out "which is a narcotic drug" in the first sentence and inserting in lieu thereof "except as provided insubparagraphs (A) and (C).";

(ii) striking out "$25,000" and "$50,000" and inserting in lieu thereof "$125,000" and "$250,000", respectively; and

(iii) striking out "of the United States" in the second sentence and inserting in lieu thereof "of a State, the United States, or a foreign county"; and

(C) in subparagraph (C), as redesignated above, by–

(i) Striking out "a controlled substance in schedule I or II which is not a narcotic drug" and ", (5), and (6)" and inserting in lieu thereof "less than 50 kilograms of marihuana, 10 kilograms of hashish, or one kilogram of hashish oil" and "and (5)", respectively;

(ii) striking out "$15,000" and "$30,000" and inserting in lieu thereof "$50,000" and "$100,000", respectively; and

(iii) striking out "of the United States" in the second sentence and inserting in lieu thereof "of a State, the United States, or a foreign country";

(2) in paragraph (2), by–

(A) striking out "$10,000" and "$20,000" and inserting in lieu thereof "$25,000" and "$50,000", respectively; and

(B) striking out "of the United States" and inserting in lieu thereof "of a State, the United States, or a foreign country";

(3) in paragraph (3), by–

(A) striking out "$5,000" and "$10,000" and inserting in lieu thereof "$10,000" and "$20,000", respectively; and

(B) striking out "of the United States" and inserting in lieu thereof "of a State, the United States, or a foreign country";

(4) in paragraph (4), by striking out "(1)(B)" and inserting in lieu thereof "(1)(C)";

(5) by striking out paragraphs (5) and (6);

(6) by adding at the end thereof the following:

"(5) Notwithstanding paragraph (1), any person who violates subsection (a) by cultivating a controlled substance on Federal property shall be fined not more than–

"(A) $500,000 if such person is an individual; and

"(B) $1,000,000 if such person is not an individual.".

SEC. 503. (a) Part D of the Controlled Substances Act is amended by adding after section 405 of the following new section:

"DISTRIBUTION IN OR NEAR SCHOOLS

"SEC. 405A. (a) Any person who violates section 401(a)(1) by distributing a controlled substance in or on, or within one thousand feet of, the real property comprising a public or private elementary or secondary school is (except as provided in subsection (b)) punishable (1) by a term of imprisonment, or fine, or both up to twice that authorized by section 841(b) of this title; and (2) at least twice any special parole term authorized by section 401(b) for a first offense involving the same controlled substance and schedule.

"(b) Any person who violates section 401(a)(1) by distributing a controlled substance in or on, or within one

thousand feet of, the real property comprising a public or private elementary or secondary school after a prior conviction or convictions under subsection (a) have become final is punishable (1) by a term of imprisonment of not less than three years and not more than life imprisonment and (2) at least three times any special [sic] term authorized by section 401(b) for a second or subsequent offense involving the same controlled substance and schedule.

"(c) In the case of any sentence imposed under subsection (b), imposition or execution of such sentence shall not be suspended and probation shall not be granted. An individual convicted under subsection (b) shall not be eligible for parole under section 4202 of title 18 of the United States Code until the individual has served the minimum sentence required by such subsection.".

(b)(1) Section 401(b) of such Act (21 U.S.C. 841(b)) is amended by inserting "or 405A" after "405".

(2) Section 401(c) of such Act is amended by inserting "405A" after "405" each place it occurs.

(3) Section 405 of such Act (21 U.S.C. 845) is amended by striking out "Any" in subsections (a) and (b) and inserting in lieu thereof "Except as provided in section 405A, any".

SEC. 504. Subsection (b) of section 1010 of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)) is amended–

(1) by redesignating paragraphs (1) and (2) as paragraphs (2) and (3), respectively, and inserting after "(b)" a new paragraph to read as follows:

"(1) In the case of a violation under subsection (a) of this section involving–

"(A) 100 grams or more of a mixture or substance containing a detectable amount of a narcotic drug in schedule I or II other than a narcotic drug consisting of–

"(i) coca leaves;

"(ii) a compound, manufacture, salt, derivative, or preparation of coca leaves; or

"(iii) a substance chemically identical thereto;

"(B) a kilogram or more of any other narcotic drug in schedule I or II;

"(C) 500 grams or more of phencyclidine (PCP);

"(D) 5 grams or more of lysergic acid diethylamide (LSD); the person committing such violation shall be imprisoned for not more than twenty years, or fined not more than $250,000, or both.";

(2) in paragraph (2), as redesignated above, by–

(A) striking out "narcotic drug in schedule I or II, the person committing such violation shall" and inserting in lieu thereof "controlled substance in schedule I or II, the person committing such violation shall, except as provided in paragraphs (1) and (3),"; and

(B) striking out "$25,000" and inserting in lieu thereof "$125,000";

(3) in paragraph (3), as redesignated above, by–

(A) striking out "a controlled substance other than a narcotic drug in schedule I or II, the person committing such violation shall" and inserting in lieu thereof "less than 50 kilograms of marihuana, less than 10 kilograms of hashish, less than one kilogram of hashish oil, or any quantity of a controlled substance in schedule III, IV, or V, the person committing such violation shall, except as provided in paragraph (4)"; and

(B) striking out "$15,000" and substituting "$50,000".

SEC. 505. Section 1012 of the Controlled Substances Import and Export Act (21 U.S.C. 962) is amended by striking out "the United States" in subsection (b) and inserting in lieu thereof "a State, the United States, or a foreign country".

SENTENCING REFORM AMENDMENTS ACT OF 1985
PUBLIC LAW 99-217
99 STAT. 1729
DECEMBER 26, 1985

An Act to extend the deadline for the submission of the initial set of sentencing guidelines by the United States Sentencing Commission, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Sentencing Reform Amendments Act of 1985".

SEC. 2. DEADLINE FOR INITIAL SET OF SENTENCING GUIDELINES.

(a) EXTENSION. – Section 235(a)(1)(B)(i) of the Comprehensive Crime Control Act of 1984 is amended by striking out "eighteen" and inserting "30" in lieu thereof.

(b) TECHNICAL AMENDMENT. – Section 235(a)(1)(B)(i) of the Comprehensive Crime Control Act of 1984 is amended by striking out "to section" and inserting "under section" in lieu thereof.

SEC. 3. CONFORMING CHANGE IN TITLE 28, UNITED STATES CODE.

Section 994(a) of title 28, United States Code, is amended by striking out "within three years" and all that follows through "Act of 1983" and inserting in lieu thereof "not later than one year after the initial set of sentencing guidelines promulgated under subsection (a) goes into effect".

SEC. 4. CONFORMING CHANGE IN COMPREHENSIVE CRIME CONTROL ACT OF 1984.

Section 235(a)(1) of the Comprehensive Crime Control Act of 1984 is amended by striking out "twenty-four" and inserting "36" in lieu thereof.

Approved December 26, 1985.

ANTI-DRUG ABUSE ACT OF 1986
P.L. 99-570
100 STAT. 3207-2
OCT. 27, 1986

TITLE I – ANTI-DRUG ENFORCEMENT

Subtitle A – Narcotics Penalties and Enforcement Act of 1986

SEC. 1001. SHORT TITLE.

This subtitle may be cited as the "Narcotics Penalties and Enforcement Act of 1986".

SEC. 1002. CONTROLLED SUBSTANCES ACT PENALTIES.

Section 401(b)(1) of the Controlled Substances Act (21 U.S.C. 84(b)(1)) is amended –

(1) by redesignating subparagraph (C) as subparagraph (D); and

(2) by striking out subparagraphs (A) and (B) and inserting the following in lieu thereof:

"(1)(A) In the case of violation of subsection (a) of this section involving –

"(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

"(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of –

"(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

"(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

"(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

"(IV) any compound, mixture, or preparation which contains any quantity of any of the substance referred to in subclauses (I) through (III)";

"(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

"(iv) 100 grams of more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

"(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

"(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide; or

"(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions for an offense punishable under this paragraph or for a felony under any other provision of this title or title III or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death

or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

"(B) In the case of a violation of subsection (a) of this section involving –

"(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

"(ii) 500 grams or more of a mixture or substance containing a detectable amount of –

"(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

"(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

"(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

"(IV) any compound, mixture, or preparation which contains any quantity of any of the substance referred to in subclauses (I) through (III)";

"(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

"(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

"(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

"(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide; or

"(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions for an offense punishable under this paragraph, or for a felony under

any other provision of this title or title III or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

"(C) In the case of a controlled substance in schedule I or II except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with

the provisions of title 18, United States Code, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions for an offense punishable under this paragraph, or for a felony under any other provision of this title III or other law of a State, the United States or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.".

SEC. 1003. OTHER AMENDMENTS TO THE CONTROLLED SUBSTANCES ACT.

(a) Section 401 of the Controlled Substances Act (21 U.S.C. 841) is further amended as follows:

(1) In subsection (b), paragraph (1)(D), as redesignated, is amended by --

(A) striking out "a fine of not more than $50,000" and inserting in lieu thereof "a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual";

(B) striking out "a fine of not more than $100,000" and inserting in lieu thereof "a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual"; and

(C) inserting "except in the case of 100 or more marihuana plants regardless of weight," after "marihuana," the first place it appears.

(2) In subsection (b), paragraph (2) is amended by striking out "a fine of not more than $25,000" and inserting in lieu thereof "a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $250,000 if the defendant is an individual, or $1,000,000 if the defendant is other than an individual", and by striking out "a fine of not more than $50,000" and inserting in lieu thereof "a fine not to exceed the greater of twice that authorized in accordance with the

provisions of title 18, United States Code, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual".

(3) In subsection (b), paragraph (3) is amended by striking out "a fine of not more than $10,000" and inserting in lieu thereof "a fine not to exceed to greater of that authorized in accordance with the provisions of title 18, United States Code, or $100,000 if the defendant is an individual or $250,000 if the defendant is other than an individual", and by striking out "a fine of not more than $20,000" and inserting in lieu thereof "a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $200,000 if the defendant is an individual or $500,000 if the defendant is other than an individual".

(4) In subsection (b), paragraph (4) is amended by striking out "1(C)" and inserting "1(D)" in lieu thereof.

(5) In subsection (b), paragraph (5) is amended to read as follows:

"(5) Any person who violates subsection (a) of this section by cultivating a controlled substances on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed –

"(A) the amount authorized in accordance with this section;

"(B) the amount authorized in accordance with the provisions of title 18, United States Code;

"(C) $500,000 if the defendant is an individual; or

"(D) $1,000,000 if the defendant is other than an individual; or both."

(6) Subsection (d) is amended by striking out "a fine of not more than $15,000" and inserting in lieu thereof "a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual".

(b) Section 102 of the Controlled Substances Act (21 U.S.C. 802) is amended –

(1) by inserting the following new paragraph after paragraph (24):

"(25) The term 'serious bodily injury' means bodily injury which involves –

"(A) a substantial risk of death;

"(B) protracted and obvious disfigurement; or

"(C) protracted loss or impairment of the functions of a bodily member, organ, or mental faculty."; and

(2) by renumbering the following paragraphs accordingly.

SEC. 1004. ELIMINATION OF SPECIAL PAROLE TERMS.

(a) The Controlled Substances Act and the Controlled Substances Import and Export Act are amended by striking out "special parole term" each place it appears and inserting "term of supervised release" in lieu thereof.

(b) The amendments made by this section shall take effect on the date of the taking effect of section 3583 of title 18, United States Code.

SEC. 1005. AMENDMENT TO THE COMPREHENSIVE CRIME CONTROL ACT OF 1984.

(a) Subsection (a) of section 224 of the Comprehensive Crime Control Act of 1984 is amended –

(1) by inserting "and" after the semicolon in paragraph (4); and

(2) by striking out paragraphs (1), (2), (3), and (5) and redesignating the other paragraphs accordingly.

(b) Section 224 of the Comprehensive Crime Control Act of 1984 is amended –

(1) by striking out subsection (b); and

(2) by redesignating subsection (c) as subsection (b).

(c) Section 225 of the Comprehensive Crime Control Act of 1984 is amended to read as follows:

"SEC. 225. Section 1515 of the Controlled Substances Import and Export Act (21 U.S.C. 960) is amended by repealing subsection (c).".

SEC. 1006. MISCELLANEOUS TECHNICAL AMENDMENTS.

(a)(1) Subsection (a) of section 3583 of title 18, United States Code, is amended by inserting, "except that the court shall include as a part of the sentence a requirement that the defendant be placed on a term of supervised release if such a term is required by statute" after "imprisonment" the second place it appears.

(2) Subsection (b) of section 3583 of title 18, United States Code, is amended by striking out "The" and inserting in lieu thereof "Except as otherwise provided, the".

(3) Subsection (e) of section 3583 of title 18, United States Code, is amended –

(A) so that the catchline reads as follows: "Modification of conditions or revocation.";

(B) in paragraph (2) by striking out "or" after the semicolon;

(C) in paragraph (3) by striking out "title." and inserting "title; or" in lieu thereof; and

(D) by inserting the following new paragraph after paragraph (3):

"(4) revoke a term of supervised release, and require the person to serve in prison all or part of the term of supervised release without credit for time previously served on postrelease supervision, if it finds by a preponderance of the evidence that the person violated a condition of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure that are applicable to probation revocation and to the provisions of applicable policy statements issued by the Sentencing Commission.".

(4) The amendments made by this subsection shall take effect on the date of the taking effect of section 3583 of title 18, United States Code.

(b) Paragraph (3) of section 994(a) of title 28, United States Code, is amended by inserting "and revocation of supervised release" after "supervised release".

(c) Section 511 of title II of the Comprehensive Drug Abuse Prevention Act of 1978 (21 U.S.C. 881) is amended –

(1) in subsection (f) by inserting "or II" after "I" each place it appears;

(2) by redesignating subsection (f) as subsection (f)(1); and

(3) by inserting the following new paragraph after subsection (f)(1) as so redesignated:

"(2) The Attorney General may direct the destruction of all controlled substances in schedule I or II seized for violation of this title under such circumstances as the Attorney General may deem necessary.".

SEC. 1007. AMENDMENT TO TITLE 18 OF THE UNITED STATES CODE.

(a) Section 3553 of title 18, United States Code, is amended by adding the following at the end thereof:

"(e) LIMITED AUTHORITY TO IMPOSE A SENTENCE BELOW A STATUTORY MINIMUM. – Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.".

(b) The amendment made by this section shall take effect on the date of the taking effect of section 3553 of title 18, United States Code.

SEC. 1008. AMENDMENT TO TITLE 28 OF THE UNITED STATES CODE.

Section 994 of title 28 of the United States Code is amended by –

(1) inserting the following after subsection (m):

"(n) The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as minimum sentence to take into account a defendant substantial assistance in the investigation or prosecution of another person who has committed an offense."; and

(2) redesignating subsections (n), (o), (p), (q), (r), (s), (t), (u), (v), and (w) as subsections (o), (p), (q), (r), (s), (t), (u), (v), (w), and (x), respectively.

SEC. 1009. AMENDMENT TO THE FEDERAL RULES OF CRIMINAL PROCEDURE.

(a) Rule 35(b) of the Federal Rules of Criminal Procedure is amended by striking out "to the extent" and all that follows through the end and inserting in lieu thereof the following: "in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code. The court's authority to lower a sentence under this subdivision includes the authority to lower such sentence to a level below that established by statute as a minimum sentence.

(b) The amendment made by this section shall take effect on the date of the taking effect of rule 35(b) of the

Federal Rules of Criminal Procedure, as amended by section 215(b) of the Comprehensive Crime Control Act of 1984.

* * *

Subtitle C – Juvenile Drug Trafficking Act of 1986

SEC. 1101. SHORT TITLE.

This subtitle may be cited as the "Juvenile Drug Trafficking Act of 1986".

SEC. 1102. OFFENSE.

Part D of the Controlled Substances Act is amended by adding after section 405A a new section as follows:

"EMPLOYMENT OR USE OF PERSONS UNDER 18 YEARS OF AGE IN DRUG OPERATIONS

"SEC. 405B. (a) It shall be unlawful for any person at least eighteen years of age to knowingly and intentionally –

"(1) employ, hire, use, persuade, induce, entice, or coerce, a person under eighteen years of age to violate any provision of this title or title III; or

"(2) employ, hire, use, persuade, induce, entice, or coerce, a person under eighteen years of age to assist in avoiding detection or apprehension for any offense of this title or title III by any Federal, State, or local law enforcement official.

"(b) Any person who violates subsection (a) is punishable by a term of imprisonment up to twice that otherwise authorized or up to twice the fine otherwise authorized, or both, and at least twice any term of supervised release otherwise authorized for a first offense. Except to the extent a greater minimum sentence is otherwise provided, a term of imprisonment under this subsection shall not be less than one year.

"(c) Any person who violates subsection (a) after a prior conviction or convictions under subsection (a) of this section have become final, is punishable by a term of imprisonment up to three times that otherwise authorized, or up to three times the fine otherwise authorized, or both, and at least three times any term of supervised release otherwise authorized for a first offense. Except to the extent a greater minimum sentence is otherwise provided, a term of imprisonment under this subsection shall not be less than one year.

"(d) Any person who violates section 405B(a)(1) or (2)

> "(1) by knowingly providing or distributing a controlled substance or a controlled substance analogue to any person under eighteen years of age; or
>
> "(2) if the person employed, hired, or used is fourteen years of age or younger,

shall be subject to a term of imprisonment for not more than five years or a fine of not more than $50,000, or both, in addition to any other punishment authorized by this section.

"(e) In any case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended and probation shall not be granted. An individual convicted under this section of an offense for which a mandatory minimum term of imprisonment is applicable shall not be eligible for parole under section 4202 of title 18, United States Code, until the individual has served the mandatory term of imprisonment required by section 401(b) as enhanced by this section.

"(f) Except as authorized by this title, it shall be unlawful for any person to knowingly or intentionally provide or distribute any controlled substance to a pregnant individual in violation of any provision of this title. Any person who violates this subsection shall be subject to the provisions of subsections (b), (c), and (e).".

SEC. 1103. TECHNICAL AMENDMENTS.

(a) Section 401(b) of the Controlled Substances Act (21 U.S.C. 841(b)) is amended by striking out "or 405A" and inserting in lieu thereof, "405A, or 405B".

(b) Section 401(c) of the Controlled Substances Act (21 U.S.C. 841(c)) is amended by striking out "405A" each place it appears and inserting in lieu thereof, "405A, or 405B".

SEC. 1104. MANUFACTURING A CONTROLLED SUBSTANCE WITHIN 1,000 FEET OF A COLLEGE.

(a) Section 405A of the Controlled Substances Act (21 U.S.C. 845a) is amended by inserting "or manufacturing" after "distributing" wherever it appears and by striking out "a public or private elementary or secondary school" wherever it appears and inserting in lieu thereof

"a public or private elementary, vocational, or secondary school or a public or private college, junior college, or university".

(b) Section 405A(a) of the Controlled Substances Act (21 U.S.C. 845a(a)) is amended by striking out "involving the same controlled substance and schedule".

(c) Section 405A(b) of the Controlled Substances Act (21 U.S.C. 845a(b)) is amended by striking out "(1) by" and all that follows through the end and inserting the following in lieu thereof:

> "(1) by the greater of (A) a term of imprisonment of not less than three years and not more than life imprisonment or (B) a term of imprisonment of up to three times that authorized by section 401(b) of this title for a first offense, or a fine up to three times that authorized by section 401(b) of this title for a first offense, or both, and (2) at least three times any term of supervised release authorized by section 401(b) of this title for a first offense.".

SEC. 1105. IMPRISONMENTS.

(a) Section 405(a) of the Controlled Substances Act (21 U.S.C. 845(a)) is amended by adding the following at the end thereof: "Except to the extent a greater minimum sentence is otherwise provided by section 401(b), a term of imprisonment under this subsection shall be not less than one year".

(b) Section 405(b) of the Controlled Substances Act (21 U.S.C. 845(b)) is amended by adding the following at the end thereof: "Except to the extent a greater minimum sentence is otherwise provided by section 401(b), a term of imprisonment under this subsection shall be not less

than one year. The mandatory minimum sentencing provisions of this paragraph shall not apply to offenses involving 5 grams or less of marihuana.".

(c) Section 405A(a) of the Controlled Substances Act (21 U.S.C. 845a(a)) is amended by adding the following at the end thereof: "Except to the extent a greater minimum sentence is otherwise provided by section 401(b), a term of imprisonment under this subsection shall be not less than one year. The mandatory minimum sentencing provisions of this paragraph shall not apply to offenses involving 5 grams or less of marihuana.".

* * *

Subtitle G – Controlled Substances Import and Export Act Penalties Enhancement Act of 1986

SEC. 1301. SHORT TITLE.

This subtitle may be cited as the "Controlled Substances Import and Export Penalties Enhancement Act of 1986.".

SEC. 1302. ENHANCED PENALTIES.

(a) Section 1010(b) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)) is amended –

> (1) by redesignating paragraph (3) as paragraph (4); and
>
> (2) by striking out paragraphs (1) and (2) and inserting the following in lieu thereof:

"(1) In the case of a violation of subsection (a) of this section involving –

"(A) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

"(B) 5 kilograms or more of a mixture or substance containing a detectable amount of –

"(i) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

"(ii) cocaine, its salts, optical and geometric isomers, and salts or isomers;

"(iii) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

"(iv) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in clauses (i) through (iii);

"(C) 50 grams or more of a mixture or substance described in subparagraph (B) which contains cocaine base;

"(D) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

"(E) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

"(F) 400 grams or more of a mixture of substances containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture

or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide; or

"(G) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana;

the person committing such violation shall be sentenced to a term of imprisonment of not less than 10 years and not more than life and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than 20 years and not more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions for an offense punishable under this subsection, or for a felony under any other provision of this title or title II or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. Any sentence under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such

term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this paragraph. No person sentenced under this paragraph shall be eligible for parole during the term of imprisonment imposed therein.

"(2) In the case of a violation of subsection (a) of this section involving –

"(A) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

"(B) 500 grams or more of a mixture or substance containing a detectable amount of –

"(i) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

"(ii) cocaine, its salts, optical and geometric isomers, and salts or isomers;

"(iii) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

"(iv) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in clauses (i) through (iii);

"(C) 5 grams or more of a mixture or substance described in subparagraph (B) which contains cocaine base;

"(D) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

"(E) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

"(F) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide; or

"(G) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana;

the person committing such violation shall be sentenced to a term of imprisonment of not less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years and not more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions for an offense punishable under this subsection, or for a felony under any other provision of this title or title II or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in

accordance with the provisions of title 18, United States Code, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposed under this paragraph shall, in the absence of such a prior conviction, include a term of suspervised [sic] release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of suspervised [sic] release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this paragraph. No person sentenced under this paragraph shall be eligible for parole during the term of imprisonment imposed therein.

"(3) In the case of a violation under subsection (a) of this section involving a controlled substance in schedule I or II, the person committing such violation shall, except as provided in paragraphs (1), (2), and (4), be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years and not more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions for an offense punishable under this subsection, or for a felony under any other provision of this title or title II or other law of a State, the United States or a foreign country relating to narcotic

drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding the prior sentence, and notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this paragraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.".

(b) Section 1010(b)(4) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)(4)), as redesignated, is amended –

(1) by striking out," except as provided in paragraph (4)";

(2) by striking out "fined not more than $50,000" and inserting in lieu thereof "fined not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $250,000 if the defendant is an

individual or $1,000,000 if the defendant is other than an individual"; and

(3) by inserting "except in the case of 100 or more marihuana plants regardless of weight," after "marihuana,".

* * *

SEC. 1866. MINOR TECHNICAL AMENDMENTS.

(a) Section 403(a)(2) of the Controlled Substances Act (21 U.S.C. 843(a)(2)) is amended by striking out the period at the end and inserting a semicolon in lieu thereof.

(b) Section 405A(b) of the Controlled Substances Act (21 U.S.C. 845a(b)) is amended by striking out "special term" and inserting "term of supervised release" in lieu thereof.

(c) Section 405A(c) of the Controlled Substances Act (21 U.S.C. 845a(c)) is amended by striking out "section 4202" and inserting "chapter 311" in lieu thereof.

(d) Section 1008(e) of the Controlled Substances Import and Export Act (21 U.S.C. 958(e)) is amended by striking out "section" the first place it appears and inserting "sections" in lieu thereof.

(e) Section 1010(b)(3) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)(3)) is amended by striking out," except as provided in paragraph (4)".

(f) The table of contents for the Comprehensive Drug Abuse Prevention and Control Act of 1970 is amended –

(1) by inserting after the item relating to section 405 the following:

"Sec. 405A. Manufacture or distribution in or near schools.

"Sec. 405B. Employment of minors in controlled substance trafficking.";

and

(2) by inserting after the item relating to section 414 the following:

"Sec. 415. Alternative fine.".

* * *

CRIMINAL LAW AND PROCEDURE TECHNICAL AMENDMENTS ACT OF 1986

PUBLIC LAW 99-646
100 STAT. 3592
NOV. 10, 1986

An Act

To amend title 18 of the United States Code and other laws to make minor or technical amendments to provisions enacted by the Comprehensive Crime Control Act of 1984, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Criminal Law and Procedure Technical Amendments Act of 1986".

* * *

SEC. 14. AMENDMENTS RELATING TO SUPERVISED RELEASE.

(a) IN GENERAL. – Section 3583(e) of title 18, United States Code, is amended –

(1) by striking out **"Modification of term or conditions."** and inserting **"Modification of conditions or revocation."** in lieu thereof; and

(2) in paragraph (1), by striking out "previously ordered".

(b) EFFECTIVE DATE. – The amendments made by this section shall take effect on the date of the taking effect of section 3583 of title 18, United States Code.

* * *

SEC. 17. CONCURRENCE OF RUNNING OF TERM OF SUPERVISED RELEASE.

(a) IN GENERAL. – Subsection (e) of section 3624 of title 18, United States Code, as added by section 212(a) of the Comprehensive Crime Control Act of 1984, is amended –

(1) by striking out ". The term" the second place it appears and inserting "and" in lieu thereof;

(2) by striking out ", except that it" and inserting ". A term of supervised release" in lieu thereof;

(3) by striking out ", other than during limited intervals as a condition of probation or supervised release,"; and

(4) by inserting before the period at the end of the third sentence the following: "unless the imprisonment is for a period of less than 30 consecutive days".

(b) EFFECTIVE DATE. – The amendment made by this section shall take effect on the date of the taking effect of such section 3624.

* * *

SEC. 28. INSERTION OF MISSING WORD.

Section 405A(b) of the Controlled Substances Act (21 U.S.C. 845a(b)) is amended by inserting "parole" after "(2) at least three times any special".

* * *

SENTENCING ACT OF 1987
PUBLIC LAW 100-182
101 STAT. 1266
DEC. 7, 1987

An Act

To amend title 18, United States Code, and other provisions of law relating to sentencing for criminal offenses.

Be it enacted by the Senate and House of Representatives of the United States of American in Congress assembled,

SECTION 1. SHORT TITLE

This Act may be cited as the "Sentencing Act of 1987".

SEC. 2. PROSPECTIVE APPLICATION OF SENTENCING REFORM ACT.

(a) APPLICATION. – Section 235(a)(1) of the Comprehensive Crime Control Act of 1984 is amended by inserting after "date of enactment" the first place it appears the following: "and shall apply only to offenses committed after the taking effect of this chapter".

(b) CONFORMING AMENDMENTS. – (1) Section 235(b)(1) of the Comprehensive Crime Control Act of 1984 is amended by striking out "convicted of an offense or adjudicated to be a juvenile delinquent" and inserting in lieu thereof "who committed an offense or an act of juvenile delinquency".

(2) Section 235(b)(3) of the Comprehensive Crime Control Act of 1984 is amended by striking out "that is within the range that applies to the prisoner under the applicable parole guideline" and inserting in lieu thereof "pursuant to section 4206 of title 18, United States Code".

* * *

SEC. 22. APPLICATION OF RULE 35(B) TO CONDUCT OCCURRING BEFORE EFFECTIVE DATE OF SENTENCING GUIDELINES.

The amendment to rule 35(b) of the Federal Rules of Criminal Procedure made by the order of the Supreme Court on April 29, 1985, shall apply with respect to all offenses committed before the taking effect of section 215(b) of the Comprehensive Crime Control Act of 1984.

* * *

SEC. 24. AUTHORITY TO LOWER A SENTENCE BELOW A STATUTORY MINIMUM FOR OLD OFFENSES.

Notwithstanding section 235 of the Comprehensive Crime Control Act of 1984 –

(1) section 3553(e) of title 18, United States Code;

(2) rule 35(b) of the Federal Rules of Criminal Procedure as amended by section 215(b) of such Act; and

(3) rule 35(b) as in effect before the taking effect of the initial set of guidelines promulgated by the United States Sentencing Commission pursuant to chapter 58 of title 28, United States Code,

shall apply in the case of an offense committed before the taking effect of such guidelines.

SEC. 25. LIMITATION ON TERM TO BE SERVED FOR VIOLATION OF CONDITIONS OF SUPERVISED RELEASE.

Section 3583(e)(4) of title 18, United States Code, is amended by striking out "Commission." and inserting in lieu thereof "Commission, except that a person whose term is revoked under this paragraph may not be required to serve more than 3 years in prison if the offense for which the person was convicted was a Class B felony, or more than 2 years in prison if the offense was a Class C or D felony.".

SEC. 26. GENERAL EFFECTIVE DATE.

The amendments made by this Act shall apply with respect to offenses committed after the enactment of this Act.

TITLE 21 – FOOD AND DRUGS
CONTROLLED SUBSTANCES ACT
PART D – OFFENSES AND PENALTIES
21 U.S.C. § 841 (1982)

§ 841. Prohibited acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally –

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this

paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

(B) In the case of a controlled substance in schedule I or II which is not a narcotic drug or in the case of any controlled substance in schedule III, such person shall, except as provided in paragraphs (4), (5), and (6) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $30,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of

imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine of not more than $10,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine of not more than $20,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine of not more than $5,000, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant

substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine of not more than $10,000, or both.

(4) Notwithstanding paragraph (1)(B) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in subsections (a) and (b) of section 844 of this title.

(5) Notwithstanding paragraph (1)(B) of this subsection, any person who violates subsection (a) of this section by manufacturing, distributing, dispensing, or possessing with intent to manufacture, distribute, or dispense, except as authorized by this subchapter, phencyclidine (as defined in section 830(c)(2) of this title) shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under paragraph (1) of this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 20 years, a fine of not more than $50,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

(6) In the case of a violation of subsection (a) of this section involving a quantity of marihuana exceeding 1,000 pounds, such person shall be sentenced to a term of imprisonment of not more than 15 years, and in addition, may be fined not more than $125,000. If any person commits such a violation after one or more prior convictions of such person for an offense punishable under paragraph (1) of this paragraph, or for a felony under any other provision of this subchapter, subchapter II of this chapter, or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, and in addition, may be fined not more than $250,000.

(c) Special parole term

A special parole term imposed under this section or section 845 of this title may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. A special parole term provided for in this section or section 845 of this title shall be in addition to, and not in lieu of, any other parole provided for by law.

(d) Piperidine offenses and penalty

Any person who knowingly or intentionally –

(1) possesses any piperidine with intent to manufacture phencyclidine except as authorized by this subchapter, or

(2) possesses any piperidine knowing, or having reasonable cause to believe, that the piperidine will be used to manufacture phencyclidine except as authorized by this subchapter.

shall be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000, or both.

(Pub. L. 91-513, title II, § 401, Oct. 27, 1970, 84 Stat. 1260; Pub. L. 95-633, title II, § 201, Nov. 10, 1978, 92 Stat. 3774; Pub. L. 96-359, § 8(c), Sept. 26, 1980, 94 Stat. 1194.)

TITLE 21 – FOOD AND DRUGS
CONTROLLED SUBSTANCES IMPORT AND EXPORT ACT
21 U.S.C. § 960 (1982)

§ 960. Prohibited acts A

(a) Unlawful acts

Any person who –

(1) contrary to sections 952, 953, or 957 of this title, knowingly or intentionally imports or exports a controlled substance,

(2) contrary to section 955 of this title, knowingly or intentionally brings or possesses on board a vessel, aircraft, or vehicle a controlled substance, or

(3) contrary to section 959 of this title, manufacturers or distributes a controlled substance,

shall be punished as provided in subsection (b) of this section.

(b) Penalties

(1) In the case of a violation under subsection (a) of this section with respect to a narcotic drug in schedule I or II, the person committing such violation shall be imprisoned not more than fifteen years, or fined not more than $25,000, or both. If a sentence under this paragraph provides for imprisonment, the sentence shall include a special parole term of not less than three years in addition to such term of imprisonment.

(2) In the case of a violation under subsection (a) of this section with respect to a controlled substance other than a narcotic drug in schedule I or II, the person committing such violation shall be imprisoned not more than five years, or be fined not more than $15,000, or both. If a sentence under this paragraph, provides for imprisonment, the sentence shall, in addition to such term of imprisonment, include (A) a special parole term of not less than two years if such controlled substance is in schedule I, II, III, or (B) a special parole term of not less than one year if such controlled substance is in schedule IV.

(c) Special parole term

A special parole term imposed under this section or section 962 of this title may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period

of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. The special term provided for in this section and in section 962 of this title is in addition to, and not in lieu of, any other parole provided for by law.

(Pub. L. 91-513, title III, § 1010, Oct. 27, 1970, 84 Stat. 1290.)

TITLE 21 – FOOD AND DRUGS
PART D – OFFENSES AND PENALTIES
21 U.S.C. § 841 (Supp. III 1985)

§ 841. Prohibited acts A

[See main edition for text of (a)]

(b) Penalties

Except as otherwise provided in section 845 or 845a of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving –

(i) 100 grams or more of a controlled substance in schedule I or II which is a mixture or substance containing a detectable amount of a narcotic drug other than a narcotic drug consisting of –

(I) coca leaves;

(II) a compound, manufacture, salt, derivative, or preparation of coca leaves; or

(III) a substance chemically identical thereto;

(ii) a kilogram or more of any other controlled substance in schedule I or II which is a narcotic drug;

(iii) 500 grams or more of phencyclidine (PCP); or

(iv) 5 grams or more of lysergic acid diethylamide (LSD);

such person shall be sentenced to a term of imprisonment of not more than 20 years, a fine of not more than $250,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 40 years, a fine of not more than $500,000. or both[1]

(B) In the case of a controlled substance in schedule I or II except as provided in subparagraphs (A) and (C).,[2] such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $125,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under

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[1] So in original. Probably should be followed by a period.

[2] So in original

any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $250,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

(C) In the case of less than 50 kilograms of marihuana, 10 kilograms of hashish, or one kilogram of hashish oil or in the case of any controlled substance in schedule III, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $50,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $100,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of

imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine of not more than $50,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine of not more than $10,000, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final,

such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine of not more than $20,000, or both.

(4) Notwithstanding paragraph (1)(C) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in subsections (a) and (b) of section 844 of this title.

(5) Notwithstanding paragraph (1), any person who violates subsection (a) of this section by cultivating a controlled substance on Federal property shall be fined not more than –

(A) $500,000 if such person is an individual; and

(B) $1,000,000 if such person is not an individual.

(c) Special parole term

A special parole term imposed under this section or section 845 845a[3] of this title may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. A special parole term provided for in this section or section 845 845a[4] of this title shall be in addition to, and not in lieu, of, any other parole provided for by law.

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[3] So in original. Probably should be "or 845a".

[*See main edition for text of(d)*]

(As amended Pub. L. 98-473, title II, §§ 502, 503(b)(1), (2), Oct. 12, 1984, 98 Stat. 2068, 2070.)

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TITLE 21 – FOOD AND DRUGS
21 U.S.C. § 960 (Supp. III 1985)

§ 960. Prohibited acts A

[*See main edition for text of (a)*]

(b) Penalties

(1) In the case of a violation under subsection (a) of this section involving –

(A) 100 grams or more of a mixture or substance containing a detectable amount of a narcotic drug in schedule I or II other than a narcotic drug consisting of –

(i) coca leaves;

(ii) a compound, manufacture, salt, derivative, or preparation of coca leaves; or

(iii) a substance chemically identical thereto;

(B) a kilogram or more of any other narcotic drug in schedule I or II;

(C) 500 grams or more of phencyclidine (PCP);

(D) 5 grams or more of lysergic acid diethylamide (LSD);

the person committing such violation shall be imprisoned for not more than twenty years, or fined not more than $250,υ00, or both.

(2) In the case of a violation under subsection (a) of this section with respect to a controlled substance in schedule I or II, the person committing such violation shall, except as provided in paragraphs (1) and (3), be imprisoned not more than fifteen years, or fined not more than $125,000, or both. If a sentence under this paragraph provides for imprisonment, the sentence shall include a special parole term of not less than three years in addition to such term of imprisonment.

(3) In the case of a violation under subsection (a) of this section with respect to less than 50 kilograms of marihuana, less than 10 kilograms of hashish, less than one kilogram of hashish oil, or any quantity of a controlled substance in schedule III, IV, or V, the person committing such violation shall, except as provided in paragraph (4)[3] be imprisoned not more than five years, or be fined not more than $50,000, or both. If a sentence under this paragraph provides for imprisonment, the sentence shall, in addition to such term of imprisonment, include (A) a special parole term of not less than two years if such controlled substance is in schedule I, II, III, or (B) a special parole term of not less than one year if such controlled substance is in schedule IV.

[*See main edition for text of (c)*]

(As amended Pub. L. 98-473, title II, § 504, Oct. 12, 1984, 98 Stat. 2070.)

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[3] So in original. Probably should be followed by a comma.

TITLE 21 – FOOD AND DRUGS
21 U.S.C. §§ 845, 845a (Supp. IV 1986)

§ 845. Distribution to persons under age twenty-one

(a) First offense

Except as provided in section 845a of this title, any person at least eighteen years of age who violates section 841(a)(1) of this title by distributing a controlled substance to a person under twenty-one years of age is (except as provided in subsection (b) of this section) punishable by (1) a term of imprisonment, or a fine, or both, up to twice that authorized by section 841(b) of this title, and (2) at least twice any special parole term authorized by section 841(b) of this title, for a first offense involving the same controlled substance and schedule. Except to the extent a greater minimum sentence is otherwise provided by section 841(b) of this title, a term of imprisonment under this subsection shall not be less than one year.

(b) Second or subsequent offense

Except as provided in section 845a of this title, any person at least eighteen years of age who violates section 841(a)(1) of this title by distributing a controlled substance to a person under twenty-one years of age after a prior conviction or convictions under subsection (a) of this section (or under section 333(b) of this title as in effect prior to May 1, 1971) have become final, is punishable by (1) a term of imprisonment, or a fine, or both, up to three times that authorized by section 841(b) of this

title, and (2) at least three times any special parole term authorized by section 841(b) of this title, for a second or subsequent offense involving the same controlled substance and schedule. Except to the extent a greater minimum sentence is otherwise provided by section 841(b) of this title, a term of imprisonment under this subsection shall be not less than one year. The mandatory minimum sentencing provisions of this paragraph shall not apply to offenses involving 5 grams or less of marihuana.

(As amended Pub. L. 98-473, title II, §§ 224(b), 503(b)(3), Oct. 12, 1984, 98 Stat. 2030, 2070; Pub. L. 99-570, title I, §§ 1005(b)(1), 1105(a), (b), Oct. 27, 1986, 100 Stat. 3207-6, 3207-11.)

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§ 845a. Distribution or manufacturing in or near schools and colleges

(a) Penalty

Any person who violates section 841(a)(1) of this title or section 856 of this title by distributing or manufacturing a controlled substance in or on, or within one thousand feet of, the real property comprising a public or private elementary, vocational, or secondary school or a public or private college, junior college, or university is (except as provided in subsection (b) of this section) punishable (1) by a term of imprisonment, or fine, or both up to twice that authorized by section 841(b) of this title; and (2) at least twice any special parole term authorized by section 841(b) of this title for a first offense. Except to

the extent a greater minimum sentence is otherwise provided by section 841(b) of this title, a term of imprisonment under this subsection shall be not less than one year. The mandatory minimum sentencing provisions of this paragraph shall not apply to offenses involving 5 grams or less of marihuana.

(b) Second offenders

Any person who violates section 841(a)(1) of this title or section 856 of this title by distributing or manufacturing a controlled substance in or on, or within one thousand feet of, the real property comprising a public or private elementary, vocational, or secondary school or a public or private college, junior college, or university after a prior conviction or convictions under subsection (a) of this section have become final is punishable (1) by the greater of (A) a term of imprisonment of not less than three years and not more than life imprisonment or (B) a term of imprisonment of up to three times that authorized by section 841(b) of this title for a first offense, or a fine up to three times that authorized by section 841(b) of this title for a first offense, or both, and (2) at least three times any term of supervised release authorized by section 841(b) of this title for a first offense.

(c) Suspension of sentence; probation; parole

In the case of any sentence imposed under subsection (b) of this section, imposition or execution of such sentence shall not be suspended and probation shall not be granted. An individual convicted under subsection (b) of this section shall not be eligible for parole under chapter

311 of title 18 until the individual has served the minimum sentence required by such subsection.

(Pub. L. 91-513, title II, § 405A, as added Pub. L. 98-473, title II, § 503(a), Oct. 12, 1984, 98 Stat. 2069, and amended Pub. L. 99-570, title I, §§ 1104, 1105(c), 1841(b), 1866(b), (c), Oct. 27, 1986, 100 Stat. 3207-11, 3207-52, 3207-55; Pub. L. 99-646, § 28, Nov. 10, 1986, 100 Stat. 3598.)

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TITLE – FOOD AND DRUGS
PART D – OFFENSES AND PENALTIES
21 U.S.C. § 841 (Supp. V 1987)

§ 841. Prohibited acts A

[See main edition for text of (a)]

(b) Penalties

Except as otherwise provided in section 845, 845a, or 845b of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving –

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of –

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound mixture, or preparation which contains any quantity of any of the substance referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide; or

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more

prior convictions for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving –

(i) 100 grams of more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of –

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substance referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide; or

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from

the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results form the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not

place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 100 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil or in the case of any controlled substance in schedule III, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant to stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least

2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the

greater of that authorized in accordance with the provisions of title 18 or $100,000 if the defendant is an individual or $250,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $200,000 if the defendant is an individual or $500,000 if the defendant is other than an individual, or both.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of title 18.

(5) Any person who violates subsection (a) of this section by cultivating a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed –

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of title 18;

(C) $500,000 if the defendant is an individual; or

(D) $1,000,000 if the defendant is other than an individual;

or both.

(c) Repealed. Pub. L. 98-473, title II, § 224(a)(2), formerly § 224(a)(6), Oct. 12, 1984, 98 Stat. 2030, as renumbered by Pub. L. 99-570, title I, § 1065(a)(2), Oct. 27, 1986, 100 Stat. 3207-6

(d) Piperidine offenses and penalty

Any person who knowingly or intentionally –

[*See main edition for text of (1) and (2)*]

shall be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions to title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both.

(e) Boobytraps on Federal property; penalties; "boobytrap" defined

(1) Any person who assembles, maintains, places, or causes to be place a boobytrap on Federal property where a controlled substance is being manufactured, distributed, or dispensed shall be sentenced to a term of imprisonment for not more than 10 years and shall be fined not more than $10,000.

(2) If any person commits such a violation after 1 or more prior convictions for an offense punishable under this subsection, such person shall be sentenced to a term

of imprisonment of not more than 20 years and shall be fined not more than $20,000.

(3) For the purposes of this subsection, the term "boobytrap" means any concealed or camouflaged device designed to cause bodily injury when triggered by any action of any unsuspecting person making contact with the device. Such term includes guns, ammunition, or explosive devices attached to trip wires or other triggering mechanisms, sharpened stakes, and lines or wires with hooks attached.

(As amended Pub. L. 98-473, title II, §§ 224(a), 502, 503(b)(1), (2), Oct. 12, 1984, 98 Stat. 2030, 2068, 2070; Pub. L. 99-570, title I, §§ 1002, 1003(a), 1004(a), 1005(a), 1103, title XV, § 15005, Oct. 27, 1986, 100 Stat. 3207-2, 3207-5, 3207-6, 3207-11, 3207-192.)

* * *

TITLE 21 – FOOD AND DRUGS
21 U.S.C. § 960 (Supp. V 1987)

§ 960. Prohibited acts A

[*See main edition for text of (a)*]

(b) Penalties

(1) In the case of a violation of subsection (a) of this section involving –

(A) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(B) 5 kilograms or more of a mixture or substance containing a detectable amount of –

(i) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(ii) cocaine, its salts, optical and geometric isomers, and salts or isomers;

(iii) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(iv) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in clauses (i) through (iii);

(C) 50 grams or more of a mixture or substance described in subparagraph (B) which contains cocaine base;

(D) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(E) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(F) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide; or

(G) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana;

the person committing such violation shall be sentenced to a term of imprisonment of not less than 10 years and not more than life and if death or serious bodily injury

results from the use of such substance shall be sentenced to a term of imprisonment of not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions for an offense punishable under this subsection, or for a felony under any other provision of this subchapter or subchapter I of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment not less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. Any sentence under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this paragraph. No person sentenced under this paragraph shall be eligible for parole during the term of imprisonment imposed therein.

(2) In the case of a violation of subsection (a) of this section involving –

(A) 100 grams of more of a mixture or substance containing a detectable amount of heroin;

(B) 500 grams or more of a mixture or substance containing a detectable amount of –

(i) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(ii) cocaine, its salts, optical and geometric isomers, and salts or isomers;

(iii) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(iv) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in clauses (i) through (iii);

(C) 5 grams or more of a mixture or substance described in subparagraph (B) which contains cocaine base;

(D) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(E) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(F) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide; or

(G) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana;

the person committing such violation shall be sentenced to a term of imprisonment not less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years and not more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions for an offense punishable under this subsection, or for a felony under any other provision of this subchapter or subchapter I of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment not less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of suspervised[2] release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of suspervised[2] release of at

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[2] So in original. Probably should be "supervised".

least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this paragraph. No person sentenced under this paragraph shall be eligible for parole during the term of imprisonment imposed therein.

(3) In the case of a violation under subsection (a) of this section involving a controlled substance in schedule I or II, the person committing such violation shall, except as provided in paragraphs (1), (2), and (4), be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years and not more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions for an offense punishable under this subsection, or for a felony under any other provisions of this subchapter or subchapter I of this chapter or other law of a State, the United States or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $2,000,000 if

the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding the prior sentence, and notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this paragraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(4) In the case of a violation under subsection (a) of this section with respect to less than 50 kilograms of marihuana, except in the case of 100 or more marihuana plants regardless of weight, less than 10 kilograms of hashish, less than one kilogram of hashish oil, or any quantity of a controlled substance in schedule III, IV, or V, the person committing such violation shall be imprisoned not more than five years, or be fined not to exceed the greater of that authorized in accordance with the provisions of title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If a sentence under this paragraph provides for imprisonment, the sentence shall, in addition to such term of imprisonment, include (A) a term of supervised release of not less than two years if such controlled substance is in schedule I, II, III, or (B) a term

of supervised release of not less than one year if such controlled substance is in schedule IV.

(As amended Pub. L. 98-473, title II, § 225, formerly § 225(a), 504, Oct. 12, 1984, 98 Stat. 2030, 2070; Pub. L. 99-570, title I, §§ 1004(a), 1005(c), 1302, 1866(e), Oct. 27, 1986, 100 Stat. 3207-6, 3207-15, 3207-55.)

No. 89-7370 (6)

In the Supreme Court of the United States

OCTOBER TERM, 1990

MOSHE GOZLON-PERETZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the mandatory minimum terms of supervised release required by the Anti-Drug Abuse Act of 1986 became effective for offenses committed on or after the date of enactment, October 27, 1986.

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OPINION BELOW

The opinion of the court of appeals deciding the question presented (J.A. 43-53) is reported at 894 F.2d 1402; the court of appeals' opinion upholding petitioner's conviction (J.A. 19-42) is reported at 865 F.2d 551.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 1990. The petition for a writ of certiorari was filed on April 25, 1990, and granted on June 18, 1990. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1002 of the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-3 to 3207-4, provides as follows:

> Section 401(b)(1) of the Controlled Substances Act (21 U.S.C. 841(b)(1)) is amended –
>
> (1) by redesignating subparagraph (C) as subparagraph (D); and
>
> (2) by striking out subparagraphs (A) and (B) and inserting the following in lieu thereof:
>
> "(1)(A) In the case of a violation of subsection (a) of this section involving –
>
> "(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;
>
> * * * * *
>
> such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life * * *, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code or $4,000,000 if the defendant is an individual * * *, or both. * * * Any sentence under this subparagraph shall * * * impose a term of supervised release of at least 5 years in addition to such term of imprisonment * * *. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.
>
> "(B) In the case of a violation of subsection (a) of this section involving –

> "(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;
>
> * * * * *
>
> such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years * * *, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, United States Code, or $2,000,000 if the defendant is an individual * * *, or both. * * * Any sentence imposed under this subparagraph shall * * * include a term of supervised release of at least 4 years in addition to such term of imprisonment * * *. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

Section 1004 of the Anti-Drug Abuse Act of 1986, 100 Stat. 3207-6, as follows:

> (a) The Controlled Substances Act and the Controlled Substances Import and Export Act are amended by striking out "special parole term" each place it appears and inserting "term of supervised release" in lieu thereof.
>
> (b) The amendments made by this section shall take effect on the date of the taking effect of section 3583 of title 18, United States Code.

STATEMENT

1. After a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted of

conspiring to distribute more than one kilogram of heroin, in violation of 21 U.S.C. 846 (Count 1); distributing approximately 240 grams of heroin, in violation of 21 U.S.C. 841(a)(1) (Count 2); and possessing more than one kilogram of heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Count 3). He was initially sentenced to concurrent terms of 20 years' imprisonment on Count 1; 15 years' imprisonment and a five-year term of special parole on Count 2; and 15 years' imprisonment and a five-year term of special parole on Count 3. He was also fined $200,000. J.A. 18.

The facts of petitioner's offenses are described in the court of appeals' opinion in *United States* v. *Levy*, 865 F.2d 551, 552-556 (3d Cir. 1989) (en banc). J.A. 23-28. In February 1987, petitioner conspired with his co-defendants Levy and Yehuda to sell heroin to an undercover DEA agent. The three defendants were arrested at the Sands Hotel in Atlantic City, New Jersey, after they agreed to sell approximately 250 grams of heroin to the undercover agent. More than two kilograms of heroin was subsequently discovered in a room that Yehuda had rented in the hotel. J.A. 27-28.

2. The court of appeals affirmed petitioner's convictions but ordered the district court to redesignate petitioner's five-year term of post-confinement monitoring as "supervised release" rather than "special parole." J.A. 53. The court rejected petitioner's argument that the post-confinement monitoring provisions of the Anti-Drug Abuse Act of 1986 (1986 Act) did not become effective until November 1, 1987, and thus that he is not subject to any form of post-confinement monitoring. J.A. 47-50.

The 1986 Act provided for a mandatory term of "supervised release" to be imposed following a term of imprisonment for a variety of serious drug offenses. See Pub. L. No. 99-570, Tit. I, §§ 1002, 1102, 1104, 1302, 1866.

Although the 1986 Act did not expressly set forth the date on which the new penalty provisions would become effective, the court of appeals applied the well-established principle that absent some provision to the contrary, a statute is deemed to be effective on the date of its enactment. Accordingly, the court held that the penalty provisions of the 1986 Act, including the portions governing post-confinement monitoring, became effective on the date of enactment, October 27, 1986, and therefore applied to petitioner's offenses, which occurred in February 1987. J.A. 43-53.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case ushers the Court into the intricacies of the federal controlled substances statutes, a body of law that Congress has frequently revisited and modified. The case arises out of one such modification, and the emergence of a new concept in federal law, that of "supervised release."

The penalties originally imposed in 1970 by the Controlled Substances Act, Pub. L. No. 91-513, Tit. II, 84 Stat. 1242, included a term of "special parole" for certain serious drug offenses. The special parole term would commence at the end of the defendant's entire term of imprisonment, even if the defendant served a portion of that term on "ordinary" parole. See 18 U.S.C. 4205, 4208 (1982); 21 U.S.C. 841(c) (1982). Revocation of special parole would result in a new term of imprisonment for the entire special parole term, with no credit for the time the defendant had spent on special parole. The defendant could be reparoled, however, prior to the end of the new term of imprisonment. 21 U.S.C. 841(c) (1982).

In 1984, as part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, ch. V, 98 Stat. 2068, Congress created a new penalty provision for large-

scale drug offenses. The new provision, 21 U.S.C. 841(b)(1)(A) (Supp. II 1984), raised the maximum term of imprisonment for a first offense from 15 to 20 years for certain large-scale drug offenses, including offenses involving 100 grams or more of heroin. For reasons that are unclear, the new provision did not contain any reference to special parole. This unexplained omission was odd, since special parole remained a part of all the sentencing provisions for serious crimes that were carried over from prior law. As of 1984, then, the statute required imposition of special parole terms for most drug offenses, but not for the least serious or the most serious.

Something else occurred in 1984. As part of a wholesale revision of the federal sentencing system, the 1984 Act prospectively abolished both ordinary and special parole and created a new type of post-confinement monitoring called "supervised release." The change-over to the new sentencing system was scheduled to take place on November 1, 1987. Under supervised release, the court rather than the Parole Commission would oversee the defendant's post-confinement monitoring (although the actual monitoring would still be performed by probation officers). See 18 U.S.C. 3583, 3601 (Supp. II 1984). The new statute authorized courts to alter the conditions, or terminate or extend the term of supervised release prior to its expiration. 18 U.S.C. 3583(e) (Supp. II 1984). In the event of a violation of the supervised release order, the statute authorized a court to hold the defendant in contempt of court. 18 U.S.C. 3583(e)(3) (Supp. II 1984).

In 1986, Congress once again amended the controlled substances statutes and comprehensively revised and enhanced the penalties for drug offenses. See Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, Tit. I, §§ 1001 *et seq.*, 100 Stat. 3207-2. In Section 1002 of the 1986 Act, Congress created a new drug penalty for especially large-

scale offenses, such as offenses involving one kilogram or more of heroin. For such high-volume offenses, Congress authorized a sentence of at least ten years and up to life imprisonment. 21 U.S.C. 841(b)(1)(A) (Supp. IV 1986). For violations involving between 100 grams and one kilogram of heroin, Congress authorized a sentence of between five and 40 years' imprisonment. 21 U.S.C. 841(b)(1)(B) (Supp. IV 1986). In both situations, Congress required the court to impose a term of supervised release. The supervised release term was to be at least five years for offenses governed by Section 841(b)(1)(A), and at least four years for offenses governed by Section 841(b)(1)(B). For other offenses involving Schedule I and II controlled substances (see 21 U.S.C. 812), the statute contained no mandatory minimum term of imprisonment (unless the offense resulted in serious injury or death), but provided for a maximum of 20 years' imprisonment. In addition, any term of imprisonment for such offenses had to be accompanied by at least a three-year term of supervised release. 21 U.S.C. 841(b)(1)(C) (Supp. IV 1986). The final subsections, 21 U.S.C. 841(b)(1)(D), (b)(2), and (b)(3) (Supp. IV 1986), carried forward the provisions of prior law largely unchanged as to imprisonment and post-confinement monitoring. Subsection (b)(1)(D) provided that offenses involving marijuana and hashish (except in the huge quantities governed by Section 841(b)(1)(A) and (B)) continued to be subject to a maximum of five years' imprisonment, and it continued to provide that any term of imprisonment had to be accompanied by at least a two-year term of special parole. Subsections (b)(2) and (b)(3) continued to provide that offenses involving Schedule IV and V controlled substances were subject to a maximum of three years' and one year's imprisonment, respectively. A term of imprisonment imposed under subsection (b)(2) was to be accompanied by at least a one-year special parole term.

Subsection (b)(3) contained no provision for special parole.[1]

The 1986 Act plugged the "gap" in post-confinement monitoring for serious drug offenders that the 1984 statute had created. It accomplished that goal by extending supervised release to all serious drug offenses, including those that under the 1984 statute would not have been subject to any post-confinement monitoring.

Petitioner argues that the 1986 Act should be read to postpone the requirement of any form of post-confinement monitoring for serious drug offenses for more than a year, until the date the new federal sentencing system was to go into effect, November 1, 1987. But the text of the 1986 Act nowhere indicates that the effective date of the Act's penalty provisions was to be postponed, and nothing in the legislative history suggests that Congress meant to delay the effectiveness of the new drug penalties or extend the gap in post-confinement monitoring for another year. It is therefore not difficult to dismiss petitioner's claim that the 1986 Act should be interpreted to postpone the effective date of the new penalty sections as a whole or to provide for no form of post-confinement monitoring for large-scale drug offenders until November 1, 1987.

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[1] In addition to changing the penalty provisions, the 1986 Act modified the provision governing the operation of supervised release. Instead of continuing to rely on contempt of court as a sanction for violation of supervised release orders, Congress established a scheme of revocation patterned after the revocation provision applicable to special parole. Under the new revocation provision, the term of supervised release could be revoked and the defendant required to serve in prison all or part of the supervised release term, with no credit for the time the defendant had spent on supervised release. 18 U.S.C. 3583(e)(4) (Supp. IV 1986).

A more difficult question is whether the form of post-confinement monitoring that Congress intended for the period between October 27, 1986, and November 1, 1987, was supervised release or special parole. That question arises because of a last-minute change that was made in the bill that became the 1986 Act. That change substituted the term "supervised release" for "special parole" in several key sections of the bill. Before that change was made, the bill had designated special parole, rather than supervised release, as the interim form of post-confinement monitoring for serious drug offenders who committed crimes between October 27, 1986, and November 1, 1987. The last-minute change indicated an apparent intention to initiate the regime of supervised release immediately, rather than postponing it for a year. Yet the drafters did not do a particularly careful job of effecting that change. In particular, they failed to eliminate the references to special parole that remained in the unamended provisions of the controlled substances statutes, and they failed to make the definitional provision for supervised release (18 U.S.C. 3583) effective immediately. As a result, there has been confusion as to which form of post-confinement monitoring was in effect during the interim period.

Complete internal consistency within the controlled substances statutes would require the last-minute change in the bill to be disregarded and the term "supervised release" to be read as if it had been left as "special parole." That reading would make it clear that special parole would be the form of post-confinement monitoring for all serious drug offenses committed between October 27, 1986, and November 1, 1987. Because, after 1986, the differences between special parole and supervised release were minor, any such judicially crafted amendment of the language of the statute would have no significant practical impact. But that course would be unfaithful to what Congress actually

did: Congress specifically designated supervised release as the appropriate form of post-confinement monitoring for defendants such as petitioner. Because the incongruities in the statute created by the institution of supervised release as of October 27, 1986, do not render the statutory scheme absurd or unworkable, the Court should take Congress at its word. The Court should hold, as the court of appeals concluded, that persons in petitioner's position are subject to terms of supervised release beginning at the conclusion of their terms of imprisonment.

ARGUMENT

THE MANDATORY MINIMUM TERMS OF SUPERVISED RELEASE REQUIRED BY THE ANTI-DRUG ABUSE ACT OF 1986 APPLY TO OFFENSES COMMITTED ON OR AFTER THE DATE OF ENACTMENT, OCTOBER 27, 1986

Section 1002 of the Anti-Drug Abuse Act of 1986 established mandatory terms of imprisonment for large-scale drug offenses such as the ones of which petitioner was convicted. In addition, it provided that any person convicted of such an offense would be subject to a mandatory term of supervised release—at least five years if the offense involved a kilogram or more of a mixture containing heroin, and at least four years if the offense involved 100 grams or more of a mixture containing heroin. See 21 U.S.C. 841(b)(1)(A) and (B) (Supp. IV 1986). Neither Section 1002 nor any other provision of the 1986 Act expressly set forth the date on which that Section would become effective.

It is well settled that in the absence of an express provision to the contrary, "an act takes effect on the date of its enactment." *United States* v. *York*, 830 F.2d 885, 892 (8th Cir. 1987), cert. denied, 484 U.S. 1074 (1988); see *Arnold* v. *United States*, 13 U.S. (9 Cranch) 104, 119-120 (1815); *Matthews* v. *Zane*, 20 U.S. (7 Wheat.) 164, 210-211

(1822); *United States* v. *Stillwell*, 854 F.2d 1045, 1047 (7th Cir.), cert. denied, 488 U.S. 973 (1988); *United States* v. *Shaffer*, 789 F.2d 682, 686 (9th Cir. 1986); 2 N. Singer, *Sutherland Statutory Construction* § 33.06 at 12 (C. Sands 4th ed. 1986). In reliance on that rule, Congress typically omits an effective date provision from a statute unless it wishes the date of effectiveness to be postponed. Because no provision delayed the effective date of Section 1002, the supervised release provisions of that statute applied to petitioner's offense. The court of appeals was therefore correct in directing the district court to impose a term of supervised release on petitioner.

In our view, the simple propositions set forth in the foregoing two paragraphs answer this case. The whole of petitioner's brief is, in essence, an effort to avoid the force of this straightforward application of statutory language and basic principles of statutory construction. We devote the remainder of our brief to rebutting those efforts. But in spite of the complexity introduced by reference to a host of statutory provisions that underwent biennial revision between 1984 and 1988, the heart of the case remains simple: on October 27, 1986, the President signed a bill that contained a provision requiring a term of supervised release for persons in petitioner's position; nothing in the bill delayed the effective date of the provision that imposed that requirement; the provision, including the mandatory term of supervised release, therefore became effective on the date the President signed the bill and made it law.

A. Congress Did Not Postpone All The Penalty Provisions In Section 1002 Of The 1986 Act

Petitioner begins with a bold stroke. He argues (Br. 24-28) that Congress intended to postpone *all* the penalty provisions of Section 1002 of the 1986 Act—not just the

supervised release provisions—until November 1, 1987, more than a year after they were signed into law. That argument is plainly wrong. It conflicts with the language of the statute, it finds no support in the legislative history, and it has been rejected by every court that has considered it.[2]

First, there is nothing in Section 1002 or any other section of the 1986 Act that suggests that the penalty provisions of Section 1002 were to have a delayed effective date. The 1986 Act expressly delayed the effective date of several of the Act's other provisions (Sections 1004(a), 1006(a), 1007(a), and 1009(a)), so the failure to prescribe a delayed effective date for Section 1002 is particularly telling. See *General Motors Corp.* v. *United States*, 110 S. Ct. 2528, 2532 (1990) (inappropriate to assume a time limitation in a silent statutory provision when "the very next provision of the Act contains just such an express time restraint"); *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."). The language of Section 1002 expressed the will of Congress to increase sentences for serious drug offenders, and nothing in the text of the statute indicates that Congress wished to supplement the new regime only after a year's delay.

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[2] See, *e.g.*, *United States* v. *Duprey*, 895 F.2d 303, 311 (7th Cir. 1989), cert. denied, 110 S. Ct. 1927 (1990); *United States* v. *Garcia*, 879 F.2d 803, 804 (10th Cir. 1989); *United States* v. *Charleus*, 871 F.2d 265, 269 (2d Cir. 1989); *United States* v. *Padilla*, 869 F.2d 372, 381-382 (8th Cir.), cert. denied, 109 S. Ct. 3223 (1989); *United States* v. *Levy*, 865 F.2d 551, 559 n.4 (3d Cir. 1989); *United States* v. *Meyers*, 847 F.2d 1408, 1415 (9th Cir. 1988).

The legislative history likewise provides no support for the "one year delay" hypothesis. The new drug penalties were enacted in an atmosphere of urgency, to provide for "increased, stiff penalties for most drug related offenses." 132 Cong. Rec. 26,473 (1986) (section-by-section analysis of Senate bill, S. 2878, 99th Cong., 2d Sess. (1986)). When last-minute conflicts developed over other aspects of the proposed bill, the legislators urged compromise so that the legislation would not be delayed until the next congressional session. See 132 Cong Rec. S15,934 (daily ed. Oct. 10, 1986) (remarks of Sen. Chiles and Sen. Dole); 132 Cong. Rec. 31,407 (1986) (remarks of Sen. Dole); 132 Cong. Rec. 32,717 (1986) (remarks of Rep. Pepper). It is impossible to infer from legislators' comments in the course of considering the 1986 Act—which unmistakably reveal the crisis atmosphere surrounding the enactment of the bill—that Congress meant to put off the effective date of the 1986 Act's penalty scheme for more than a year.

Petitioner's argument rests entirely on the supposed anomaly created by the immediate imposition of mandatory minimum terms of imprisonment by Section 1002 and the postponement of the changes made by Sections 1007(a) and 1009(a) of the 1986 Act. The latter provisions authorized sentencing below the mandatory minimum for certain offenders who cooperated with the government. See Pub. L. No. 99-570, Tit. I, §§ 1007(b), 1009(b). Petitioner argues that if Section 1002 became effective upon enactment, there would be no possibility of sentences below the mandatory minimum for offenses committed during the one-year period between October 27, 1986, and November 1, 1987.

There is no such anomaly. Congress recognized this potential problem and fixed it. In December 1987, Congress enacted corrective legislation that ensured that the provisions permitting departures from mandatory mini-

mum sentences in the case of cooperating defendants would apply to offenses committed before the effective date of the sentencing guidelines, November 1, 1987. See Sentencing Act of 1987, Pub. L. No. 100-182, § 24, 101 Stat. 1271.[3] Not only does that legislation undermine petitioner's claim of an anomaly, but it destroys his argument that Congress intended the mandatory minimum penalties of Section 1002 to be postponed until November 1, 1987. The corrective statute was necessary because, and only because, Congress recognized that the mandatory minimum penalties had gone into effect as of October 27, 1986, and that the offsetting provision for reductions of sentence below the mandatory minimums should be made effective for the year preceding the effective date of the guidelines.

Finally, petitioner's argument that the whole of Section 1002 did not become effective until November 1, 1987, would have implications beyond the operation of that specific section. Section 1102 of the 1986 Act created a new offense of employing or using persons under 18 years of age in drug operations. See 20 U.S.C. 845b (Supp. IV 1986). Like Section 1002, the new provision required a mandatory minimum term of imprisonment for high-volume offenses, and it made parole inapplicable to persons convicted of that offense. The logic of petitioner's

[3] Petitioner suggests (Br. 27 n.17) that this provision was rendered ineffective because the Sentencing Act of 1987 contained a section establishing the "general effective date" of that statute, which provided that it would apply "with respect to offenses committed after the enactment of this Act." Pub. L. No. 100-182, § 26, 101 Stat. 1272 (1987). By its terms, however, Section 24 is not governed by that "general" effective date, because Section 24 expressly applies to "an offense committed before the taking effect of [the sentencing] guidelines"; the Sentencing Act of 1987 was enacted on December 7, 1987, after the guidelines took effect.

argument would require that the effective date of Section 845b also be postponed until November 1, 1987, even though there is not a shred of evidence that Congress intended that section to lie fallow for a year.[4]

B. The Post-Confinement Monitoring Provisions Of The 1986 Act Became Effective On October 27, 1986

Petitioner's principal contention (Br. 28-49) is that even if the fine and imprisonment provisions of Section 1002 were intended to go into effect immediately, Congress intended to delay the effective date of the post-confinement monitoring provisions of Section 1002 until November 1, 1987. Thus, because prior to the effective date of Section 1002 the controlled substances statutes contained no provision for post-confinement monitoring for the category of large-scale drug offenses that was created in 1984, petitioner argues that he may not be sentenced to either special parole or supervised release.

[4] Petitioner notes (Br. 28) that the no-parole sentences provided by Section 1002 of the 1986 Act are like the sentences contemplated by the 1984 Act, which prospectively eliminated parole. He suggests that this similarity shows that Congress intended the 1986 penalty provisions to be effective at the same time as the new federal sentencing system. But if Congress had intended the 1986 penalty provisions to take effect only as of November 1, 1987, it would have been unnecessary to state that parole was unavailable for the 1986 sentences of incarceration, since the 1984 Act eliminated parole altogether; that is, because every sentence imposed for conduct committed after November 1, 1987, is a no-parole sentence, the no-parole language in Section 1002 would be surplusage if Section 1002 did not go into effect until that date. The same point applies, of course, to section 1102 of the 1986 Act (21 U.S.C. 845b), which expressly bars the application of the parole laws to the offense created by that section. The "no parole" provision in Section 1102 makes it clear that Congress contemplated that it would become effective before the November 1, 1987 effective date of the new federal sentencing system.

Contrary to petitioner's contention, it is clear from the text, the structure, and the background of the 1986 Act that Congress wanted all the penalty provisions in Section 1002 to go into effect at the same time. First, the new penalty provisions were all enacted together as part of Section 1002. We showed in Part A that Section 1002 went into effect on the date of its enactment, October 27, 1986. It is a very small step to the further conclusion that *all* of Section 1002, including the supervised release provisions, went into effect at that time. No provision of the statute postponed the effective date of the supervised release provisions, and it would be inconsistent with the approach used in other parts of the 1986 Act for different ingredients of the penalty provisions of Section 1002 to become effective at different times.[5]

Second, the structure of the new penalty provisions indicates that Congress wanted all three penalty features to go into effect together. The new penalties—imprisonment, fines, and supervised release—were grouped together in a single paragraph for each of the new offense levels in Section 841(b)(1). The package of penalties for each offense level was thus obviously intended to operate as an integrated whole. It is difficult to imagine that Congress could have wanted the third part of the new three-part penalty scheme to be postponed for a year while the first two—imprisonment and fines—went into effect immediately.

Finally, the drafting history of the 1986 Act confirms that Congress intended the post-confinement monitoring provisions for large-scale drug offenses to become effectively immediately upon enactment. Both the House and

[5] Every provision of the 1986 Act that expressly postponed the effective date of some part of the Act operated on a discrete section or subsection. See Sections 1004(b), 1006(a)(4), 1007(b), and 1009(b).

Senate versions of the bill that became the 1986 Act contained the basic features of the statute as ultimately enacted, including the offense classification scheme and the requirements for mandatory minimum terms of imprisonment with no parole. The original bills also required that a term of "special parole" be imposed as part of the package of penalties under each subsection of Section 841(b). See H.R. 5484, 99th Cong., 2d Sess. (1986); S. 2878, 99th Cong., 2d Sess.(1986). Under both bills, the new penalty provisions were to become effective immediately and to apply until the effective date of the new federal sentencing system, November 1, 1987. The House bill provided for special parole to be repealed as of that date, while the Senate bill provided that at that time all references to special parole were to be changed to supervised release. See H.R. Rep. No. 845, 99th Cong., 2d Sess. 20 (1986); 132 Cong. Rec. H6630 (daily ed. Sept. 11, 1986) (§ 608(b) of House bill); 132 Cong. Rec. 26,101 (1986) (§ 1007 of Senate bill).[6] The House concurred in the Senate's version. 132 Cong. Rec. 29,608-29,633 (1986).

Just before final passage of the bill, and without explanation, the words "supervised release" were substituted for the words "special parole" whenever the term "special parole" appeared in Section 1002 and other penalty provisions of the bill. See 132 Cong. Rec. 32,728-32,745 (1986).

[6] The Senate bill was taken from the Administration's proposal, see The Drug-Free America Act of 1986, a Proposal to Congress from the President of the United States, H.R. Doc. No. 266, 99th Cong., 2d Sess. 1-3 (1986). The commentary accompanying the proposal explained that "this amendment in effect transfers special parole into supervised [release] once the Sentencing Reform Act's supervised release provisions go into effect." H.R. Doc. No. 266, *supra*, at 119. That comment makes clear that the post-confinement monitoring provisions were to go into effect immediately, but would change from special parole to supervised release as of November 1, 1987.

That version was enacted by both houses and signed into law on October 27, 1986.[7]

Nothing about the last-minute change suggests that Congress meant for it to delay the effective date of any part of Section 1002 or the other affected provisions. Prior to the change, the bill provided for special parole to serve as the form of post-confinement monitoring until November 1, 1987, when special parole would be replaced by supervised release. The most plausible explanation for the change is that the drafters wanted to accelerate the shift from special parole to supervised release, and to go to a system of supervised release immediately rather than extending special parole for another year. But whatever the reason for the last-minute change, one thing is clear: if Congress had wanted to alter the pending bill by postponing *any* form of post-confinement monitoring until November 1, 1987, it would not have done so by substituting one form of post-confinement monitoring for another in sections of the bill that were to become effective immediately.

In support of the his argument, petitioner invokes (Br. 14-19) Section 1004 of the 1986 Act. That Section went into effect on November 1, 1987, and amended the controlled substances statutes by substituting "term of supervised release" for "special parole term" wherever the latter

[7] The last-minute change in terminology from "special parole" to "supervised release" affected all the provisions being added by the new bill, but it did not affect those penalty provisions of the controlled substances statutes that had called for special parole prior to 1986 and were not amended by the 1986 Act. Thus, supervised release was called for in the following provisions of Title 21: Sections 841(b)(1)(A), 841(b)(1)(B), 841(b)(1)(C), 845a(b), 845b(b), 845b(c), 960(b)(1), 960(b)(2), and 960(b)(3). The following provisions were unaffected by the change in terminology and continued to provide for "special parole" even after the 1986 Act: Sections 841(b)(1)(D), 841(b)(2), 845(a), 845(b), 845a(a), 960(b)(4), and 962(a).

appeared. Petitioner describes Section 1004 as "deal[ing] explicitly with the question of when mandatory supervised release became effective." Pet. Br. 15. That is true for all provisions of the statute that continued to use the term "special parole" as of November 1, 1987. But Section 1004 did not affect provisions of the statute in which the conversion to supervised release had already been made, *i.e.*, those provisions that were converted to supervised release as a result of the last-minute change in the 1986 Act.[8]

As we explained in Part A above, Section 1002 and the other penalty provisions of the 1986 Act went into effect immediately upon enactment. For that reason, Section 1004 did not affect those provisions at all. The post-confinement monitoring scheme established by those provisions of the 1986 Act is therefore fully applicable to petitioner.[9]

[8] Although petitioner concedes (Br. 16) that Section 1004 "does not literally apply to this petitioner's case," he offers an interpretation of Section 1004 that would avoid the inconvenience of an immediately effective Section 1002. He submits, albeit somewhat tentatively (Br. 16-17), that Section 1004 was meant to substitute supervised release for special parole where the latter term appeared in the controlled substances statutes as of 1984, not where it appeared as of November 1, 1987.

That argument is inventive, but it does not work. Section 1004 states only that the substitution of one term for another in the controlled substances statutes will take place on November 1, 1987. It says nothing about which version of the law will be in effect on that day.

[9] Petitioner argues (Br. 21) that the effective date of all provisions of the 1986 Act calling for supervised release must be delayed because offenders sentenced under one such provision, Section 845a(a), were eligible for ordinary parole, and Congress could not have intended offenders to serve terms of parole and supervised release under the same provision. Yet parole and supervised release are not irreconcilable.

C. Petitioner Was Subject To A Mandatory Term Of Supervised Release Rather Than Special Parole

Even if we are correct that Congress intended some form of post-confinement monitoring to go into effect as of October 27, 1986, it could still be argued (although petitioner does not so argue) that the form of post-confinement monitoring that should apply during the one-year interim period is special parole rather than supervised release. If that argument were accepted, it would resolve many of the statutory anomalies created by applying Section 1002 of the 1986 Act according to its terms. And since special parole and supervised release are so similar, construing the statute in that way would not defeat Congress's purpose of ensuring that some form of post-confinement monitoring would be applicable to persons committing

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Prior to 1987, when certain prison sentences under Section 841(b) were still subject to parole, it was not unusual for an offender to serve part of a term of incarceration in prison and part on parole, to be followed by a term of special parole. By analogy, there is no reason why an offender who completes a term of "ordinary" parole cannot then serve a term of supervised release.

Petitioner also notes (Br. 21-22) that in technical amendments enacted on November 10, 1986, Congress corrected a typographical error in a preexisting section, 21 U.S.C. 845a(b) (Supp. II 1984); the amendment substituted the words "special parole term" for the words "special term." However, the words "special term" had already been changed to read "supervised release" by Section 1866(b) of the October 27, 1986, Act, thus superseding the statute that the technical amendment purported to correct. The best explanation for this sequence is simple oversight—a failure to recognize that Congress had already repealed the statute that the technical amendment was designed to repair. That minor error does not in any way evince a congressional intent to delay all the supervised release sentences provided for in the 1986 Act.

crimes after October 27, 1986. In fact, there is only one real problem with that construction of the statute, but it is an imposing one: the language of the statute, which unambiguously refers to supervised release, is squarely to the contrary.

The drafters who made the last-minute switch from special parole to supervised release in the 1986 Act apparently failed to recognize the need to make a variety of corresponding changes in provisions of the underlying statute that were not amended by the 1986 Act. Congress's failure to make those corresponding changes led to the statutory anomalies that we discuss below and to which petitioner devotes much of his brief. But Congress's lack of attention to the collateral effects of the change from special parole to supervised release does not justify judicial disregard of the change itself. The anomalies indicate, of course, that the statute does not function as smoothly as it might. But inefficiency does not confer upon the courts a license to legislate. As this Court has held time and again, it is the duty of the courts to apply the statute as written, even if it would have been more sensible for Congress to have drafted the statute differently. See *Commissioner* v. *Asphalt Products Co.*, 482 U.S. 117, 121 (1987) ("Judicial perception that a particular result would be unreasonable may enter into the construction of ambiguous provisions, but cannot justify disregard of what Congress has plainly and intentionally provided."); *Busic* v. *United States*, 446 U.S. 398, 404-405 (1980) ("to the extent that cases can be hypothesized in which [the Court's holding] may support curious or seemingly unreasonable comparative sentences, it suffices to say that the asserted unreasonableness flows not from [the Court's decisions], but rather from the statutes as Congress wrote them");

Bifulco v. *United States*, 447 U.S. 381, 401 (1980) (Burger, C.J., concurring) ("Our compass is not to read a statute to reach what we perceive—or even what we think a reasonable person should perceive—is a 'sensible result'; Congress must be taken at its word unless we are to assume the role of statute revisers"); see also *TVA* v. *Hill*, 437 U.S. 153, 173 (1978).

Petitioner argues (Br. 40-44) that the district court may not impose a sentence of supervised release for offenses committed prior to November 1, 1987, because Section 3583 of Title 18, which sets forth guidelines for imposing and revoking supervised release, did not go into effect until that date. See Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, § 212, 98 Stat. 1999. But the premise of petitioner's argument is wrong: the "general power of judges to impose supervised release" (Br. 42) on offenders such as petitioner does not arise from Section 3583. In Section 1002 of the 1986 Act, which amended Section 841(b) of Title 21, Congress explicitly granted sentencing courts authority to impose post-confinement monitoring in the form of supervised release. Thus, the source of the district court's sentencing authority in petitioner's case is 21 U.S.C. 841(b), not 18 U.S.C. 3583. The effective date of Section 3583 therefore does not control the availability of supervised release with respect to offenses governed by the penalty provisions of Section 841(b).

Section 3583 sets forth the conditions that a court must include in an order providing for supervised release (Section 3583(d)), and it governs when an order of supervised release may be revoked or its conditions modified (Section 3583(e)). Petitioner suggests that supervised release could not be imposed before Section 3583 went into effect. That is not true. While it may have been more symmetrical for

all the supervised release provisions to go into effect at the same time, the supervised release provisions of Section 1002 functioned as intended during the period between October 27, 1986, and November 1, 1987, even though Section 3583 was not in effect during that time.

The only consequence of the delay in the effective date of Section 3583 is that, in imposing supervised release prior to November 1, 1987, courts were not strictly bound by the conditions set forth in Section 3583. Nonetheless, the enacted but as yet inchoate Section 3583 gave clear direction to the courts as to the conditions Congress believed to be appropriate for supervisory release orders, and we are unaware of any case in which a district court departed from those terms simply because the court theoretically had authority to do so. The situation is no different than if Congress had chosen not to enact Section 3583 at all, but instead had simply indicated informally and in a nonbinding fashion how it expected the courts to administer the new form of post-confinement monitoring.

Petitioner argues (Br. 22-23) that supervised release imposed for offenses committed prior to November 1, 1987, could not be revoked, because the revocation provision of Section 3583 was not in effect at that time. Because Congress could not have intended to create a remedy with no means to enforce it, petitioner argues, the unavailability of revocation for offenses committed prior to November 1, 1987, is another reason not to construe the Act to provide for supervised release during that period.

There are two responses to that argument. First, as a practical matter, the delay in the effective date of the revocation provision of Section 3583 is unlikely to have affected any cases. To be eligible for supervised release under the 1986 Act, a defendant would have to commit his crime after October 27, 1986. By the time such a defendant was arrested and convicted, served a term of imprison-

ment, violated his supervised release, and was re-arrested for that violation, the revocation provision of Section 3583 would almost certainly have become effective. We are aware of no case in which this problem has arisen.[10]

Second, even if revocation was unavailable for crimes committed prior to November 1, 1987, that does not mean that supervised release orders entered in such cases were toothless. A violation of a supervised release order, like a violation of any other order that a court is authorized to enter, could be punished as a contempt of court, see 18 U.S.C. 401(3).[11]

To be sure, one may well question why Congress, having chosen to enact guidelines for imposing and administering supervised release, decided to require offenders to receive sentences of supervised release before those guidelines would go into effect. Most likely, the drafters simply overlooked the delayed effective date of Section 3583 when they made the last-minute change from special parole to supervised release in Section 1002 of the 1986 Act. They also likely overlooked the confusion that the change would produce in the administration of provi-

[10] There is no *ex post facto* problem in applying the revocation provision of Section 3583 to defendants who committed crimes prior to November 1, 1987, since at the time of the crime, those defendants had notice that they would be subject to the revocation procedures set forth in Section 3583 if their supervised release terms were revoked after November 1, 1987.

[11] Coincidentially, contempt of court was the remedy specified in the 1984 version of Section 3583 for violations of supervised release orders. Although the contempt of court sanction was replaced by a system of revocation when Section 3583 was amended in 1986, even before it came into effect, Congress's prospective choice of contempt of court as a remedy indicates that there would be nothing anomalous about relying on that remedy to enforce orders of supervised release when no other statutory remedy is provided.

sions that imposed one form of post-confinement monitoring by cross-reference to provisions that prescribed a different form of post-confinement monitoring.[12] However, the fact that the oversight has created awkwardness in applying a few of the Act's other penalty provisions is insufficient to overcome the unequivocal requirement of the statute that a defendant in petitioner's position serve a mandatory term of supervised release.

[12] The cross-references to Section 841(b)(1) that are found in Sections 845, 845a, and 845b create the problem. Prior to November 1, 1987, Sections 845 and 845a(a) imposed special parole terms that were multiples of the special parole terms authorized by Section 841(b) for the same type and quantity of drug. Section 845a(b) and 845b imposed supervised release terms that were multiples of the supervised release terms authorized by Section 841(b)(1) for the same type and quantity of drug. That system works fine when the offense of conviction and the pertinent subsection of Section 841(b)(1) prescribe the same form of post-confinement monitoring, but it does not work when the two prescribe different forms of post-confinement monitoring. Thus, for example, for crimes committed before November 1, 1987, a first offense of distributing a kilogram or more of heroin within 1000 feet of a school (21 U.S.C. 845a(a) (Supp. IV 1986)) called for "at least twice any special parole term authorized by Section 841(b)," but the corresponding provision of Section 841(b) (21 U.S.C. 841(b)(1)(A) (Supp. IV 1986)) called for a term of supervised release, not special parole. That statutory mismatch and the other similar mismatches created by the cross-reference provisions in Sections 845, 845a, and 845b are obviously just drafting errors; because it would be "demonstrably at odds with the intention of [the] drafters" to impose no post-confinement monitoring in those cases, see *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982), those cross-reference problems, when they arise, should be solved by reading the subsection containing the cross-reference as if it imposed the same form of post-confinement monitoring as the crime of conviction. It is not necessary to address that question in this case, however, since petitioner was not convicted of a crime involving any of the mismatched cross-references.

Finally, petitioner argues (Br. 44-49) that failing all else, he should prevail because of the rule of lenity. But as this Court observed, the rule of lenity "only serves as an aid for resolving an ambiguity; it is not to be used to beget one. * * * The rule comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers." *Callanan* v. *United States*, 364 U.S. 587, 596 (1961). Because Congress spoke plainly in Section 1002, there is no ambiguity in this case for the rule of lenity to resolve. See *United States* v. *Turkette*, 452 U.S. 576, 587-588 n.10 (1981); *United States* v. *Batchelder*, 442 U.S. 114, 121 (1979); *Scarborough* v. *United States*, 431 U.S. 563, 577 (1977). The fact that the last-minute change from special parole to supervised release may have been careless does not mean that the change rendered the statute ambiguous.

The rule of lenity does not help petitioner for another reason. As we have argued above, it is quite clear that Congress intended some form of post-confinement monitoring to be available for persons in petitioner's position immediately upon the enactment of the 1986 Act. Therefore, the only question as to which there can be a serious claim of ambiguity is which form of post-confinement monitoring is applicable. As petitioner concedes (Br. 30), it is not clear whether special parole or supervised release is more "lenient"; the rule of lenity would therefore be difficult to apply in this setting in any event. But petitioner is not asking for the rule of lenity to be used to determine which of the two competing forms of post-confinement monitoring should be applicable to him. He is making the very different, and much bolder, claim that the rule of lenity should be applied to free him from any post-confinement monitoring at all. His boldness should not be rewarded. The language, history, and purpose of the

statute unambiguously establish that Congress intended a defendant like petitioner to be subject to some form of post-confinement monitoring; in consequence, the rule of lenity cannot properly be invoked to frustrate that decision.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 89-7370

In The

Supreme Court of the United States

October Term, 1990

MOSHE GOZLON-PERETZ,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF FOR THE PETITIONER

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v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The
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For The Third Circuit

REPLY BRIEF FOR THE PETITIONER

On resentencing after affirmance of petitioner Gozlon's convictions for heroin offenses committed in February 1987, the district court imposed concurrent special parole terms of five years each on the two substantive counts. The court also imposed 15 years' imprisonment on Counts 2 and 3 for possession and distribution, and 20 years for conspiracy on Count 1, all concurrent, as well as

a fine of $200,000 on Count 3. J.A. 18.[1] On appeal after remand, the court of appeals held that the lower court had erred in imposing special parole terms, but remanded for the imposition of terms of supervised release.[2] *United States v. Gozlon-Peretz*, 894 F.2d 1402, 1404 (3d Cir. 1990); J.A. 43-53.[3]

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[1] Contrary to the respondent's counterstatement of the case, Resp. Br. 4, this was not the petitioner's "initial[ ]" sentence. *See* Pet. Br. 2-3 and appendix references found there for an accurate statement of the procedural history of the case.

[2] Contrary to respondent's brief, the court of appeals did not "order[ ] the district court to redesignate petitioner's five-year term of post-confinement monitoring as 'supervised release' rather than 'special parole.' " Resp. Br. 4; *compare* J.A. 53. The district court would be free, if the judgment below were affirmed, to impose any lawful terms of supervised release that did not create an appearance of vindictiveness. *Texas v. McCullough*, 475 U.S. 134 (1986); *Wasman v. United States*, 468 U.S. 559 (1984).

[3] The split in the Circuits continues. Compare *United States v. Hessen*, 911 F.2d 651 (11th Cir. 1990) (per curiam) (sentence to supervised release vacated and case remanded for imposition of special parole for possession of unspecified quantity of cocaine in October 1987, although said in fact by defendant to exceed one kilogram and thus to be subject to no extra supervision under pre-ADAA law), with *United States v. Blackmon*, 1990 WestLaw 133509 (6th Cir., filed Sept. 19, 1990) (agreeing with Third Circuit decision in the instant case, describing that court as having "corrected this congressional oversight").

ARGUMENT IN REPLY

A TERM OF SUPERVISED RELEASE MAY NOT BE IMPOSED AS PART OF THE SENTENCE FOR CONTROLLED SUBSTANCES OFFENSES COMMITTED BEFORE NOVEMBER 1, 1987, WHEN THE LAW PROVIDING FOR SUPERVISED RELEASE BECAME EFFECTIVE.

Petitioner Gozlon's position in this case begins from the simple premise that a statute that does not state its effective date requires judicial construction when that date becomes an issue in a case. While that question of construction is often easily answered by reference to the presumption that a statute is ordinarily deemed effective immediately upon its being signed by the President, that "rule," like any other axiom of construction, may be overcome or displaced by a compelling marshaling of evidence from the language, structure, purpose and history of the same and related statutes, taken in the light of other applicable rules of construction. See *Gardner v. Barney, Collector*, 6 Wall. (73 U.S.) 499, 511 (1868).[4] The petitioner's argument follows this method to demonstrate that the supervised release provisions of the Anti-Drug Abuse Act of 1986 were effective only for offenses committed on or after November 1, 1987, when the Sentencing Reform Act provisions governing the imposition, content, carrying out, and revocation of supervised release went into effect.

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[4] Respondent's brief makes no mention of this case, which appears to be the only one in the Court's history to address the issue, and with which the petitioner begins his discussion. *See* Pet. Br. 12-13.

The argument for the United States, on the other hand, apparently proceeds from the suggestion that legislative silence as to a statute's effective date is a kind of "plain language" which adopts *sub silentio* a "rule" of immediate effectiveness. Resp. Br. 11.[5] The respondent does not actually rely on that position, however, as its brief goes on to attempt to address most of the arguments made by the petitioner. The respondent's answers, however, are not persuasive.

1. The Term "Supervised Release," as Used in the 1986 Anti-Drug Act, Was Meaningless Without the Simultaneous Existence of the Supervised Release Provisions of the Sentencing Reform Act.

The principal fallacy of the respondent's position is revealed on page 23 of its brief. The United States concedes that 18 U.S.C. § 3583, which defines and governs

[5] The court of appeals cases cited by the respondent for the proposition that only an "express provision to the contrary" can override this "rule" of construction offer only *ipse dixit* in its defense; none of them deals with any effort to override the presumption on the basis of other evidence of the statute's meaning, as here. This Court has never so much as hinted that statutory language must be "express" to overcome the presumption, and *Gardner v. Barney, supra*, is to the contrary. Nor does the citation to *Arnold v. United States*, 9 Cranch (13 U.S.) 104, 119-20 (1815), Resp. Br. 10, add anything to the discussion. That case addresses the question whether a law expressly providing that it shall be effective "from and after" a date which is not in dispute is effective on that very day, or only beginning on the next day; *Arnold*, although often cited for the proposition at issue in this case, is actually irrelevant to it.

the "unique and novel concept," *Bifulco v. United States*, 447 U.S. 381, 390 (1980), of supervised release, "was not in effect during" the October 1986 to November 1987 time period when this petitioner's offenses were committed and that sentencing courts were thus not "strictly bound" by its provisions. Resp. Br. 23. Yet if courts were not bound by the restrictions of § 3583 in imposing terms of "supervised release" prior to November 1, 1987, then the respondent must be arguing that Congress called upon judges to impose a kind of criminal sentence of no defined meaning.

Neither ADAA § 1002 nor any other law even arguably effective prior to November 1987 limited a judge in any way as to who or what agency would perform the supervision, where the released person would be supervised, whether that term would run concurrently or consecutively with the defendant's "mandatory release" under 18 U.S.C. §§ 4163-4164 (repealed effective November 1, 1987),[6] what conditions of release might apply,

[6] Under those provisions, a prisoner such as the petitioner, serving a sentence for an offense committed before November 1, 1987, who is ineligible for or is not granted parole is released after service of the full term of the sentence, less deductions for good conduct awarded under *id.* §§ 4161-4162. For the duration of the full term less 180 days, that person is supervised by agents of the U.S. Parole Commission "as if on parole." Similarly, the respondent admits that under its construction of the 1986 Act an offender could end up on both supervised release and parole for the same violation of 21 U.S.C. § 845a(a), Resp. Br. 19 n.9, suggesting that the two forms of supervision are "not irreconcilable," even though one was created for the sole purpose of displacing the other.

what the consequences of violation might be,[7] how the fact of violation would be determined and by whom, or any of a host of other practical problems. A provision for criminal punishment that is so completely free of definite or uniform meaning would surely be unenforceable, if not unconstitutional.[8] It should not lightly be presumed that Congress intended to establish such an unprecedented, free-floating penalty.

In addition, the respondent understates the implications of its contention. The theory that Congress granted unconstrained discretion to each sentencing judge to define "supervised release" for him- or herself would not be limited to sentences imposed prior to November 1, 1987. Although it is true that there would be "no *ex post facto* problem," Resp. Br. at 24 n.10, in applying the procedural aspects of § 3583 to sentences imposed after

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[7] The respondent suggests that pre-November 1, 1987, supervised release, like any other court order, would be enforceable by contempt of court proceedings. Congress initially had the same idea, but soon thought better of it. *See* Pet. Br. 23 n.12; *compare* Resp. Br. 24 n.11 (erroneously stating, without citation, that this change occurred in 1986). Contrary to the respondent's suggestion, *id.*, the idea that Congress intended the possibility of life imprisonment without parole to be available under the provisions of 18 U.S.C. § 401(3) for supervised release violators is indeed "anomalous."

[8] A criminal law which in effect gave judges power to sentence in their uncontrolled discretion would surely violate the due process clause and the separation of powers (by delegating a legislative function). Moreover, the respondent's suggestion that Congress intended such sentencing is inconsistent with the entire philosophy behind the 1984 Sentencing Reform Act. *See Mistretta v. United States*, 488 U.S. 361 (1989).

November 1, 1987, for offenses committed before that date (nor did the petitioner's brief suggest otherwise), such application would nevertheless be impermissible on statutory grounds. As noted in our opening brief, at 23 n.12 (but ignored by the respondent) Congress explicitly prohibited judges from using § 3583 for pre-1987 offenses. Pub.L. 100-182, § 2(a); Pet.Stat.App. 50.[9]

The parties are in agreement that Congress, at the last moment, decided to substitute the phrase "term of supervised release" for the phrase "special parole term" in § 1002 and other similar provisions of the ADAA. It is not known why. Construction *in pari materia* with the Sentencing Reform Act,[10] not to mention the argument from necessity made above, suggests that Congress resolved not to perpetuate the regime of parole, including "special parole," which it had already determined to

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[9] "Pet.Stat.App." means the appendix of statutes bound with petitioner's brief. Congress declared that the Sentencing Reform Act, of which § 3583 is a part, "shall apply only to offenses committed after the taking effect of this chapter," *i.e.*, November 1, 1987. Thus, the respondent's discussion of why there is no real "problem," Resp. Br. 23-24, which depends on invoking § 3583 for a pre-1987 offense, misses the mark.

[10] We never suggested, much less made it the "premise" of our argument, that § 3583 was the source of "power" for the imposition of supervised release in a drug case. *Compare* Resp. Br. 22 *with* Pet. Br. 42 (phrase "general power . . . to impose supervised release" refers to authority to impose it as part of any felony sentence under the SRA, as opposed to specific grant of power in 21 U.S.C. § 841(b), as amended). Section 3583, however, is a necessary source of standards for controlling discretion in the imposition of supervised release and of procedures for implementing it.

abolish, but decided instead to integrate the penalty provisions of the 1986 Act with the new sentencing law which would be going into effect in just about one year.

The respondent points out that § 1002 has no effective date language itself, while other sections of the same statute do, inferring from this fact that § 1002 must not have been intended to become effective on a later date. Resp. Br. 12. The cases cited by the respondent in support of this approach did not involve provisions that work together and must be construed *in pari materia*. In that situation, as exists here, it is not necessary for Congress to repeat the effective date language in every section. The history of the Sentencing Reform Act shows that Congress well understood the difficulty of making even urgently desired changes in sentencing laws immediately. Thus, there is nothing remarkable about the conclusion that provisions of the 1986 Act would not become effective until November 1987.

After unusually thorough and praiseworthy deliberation, Congress determined in 1984 that a two-year period (later extended to three) would be needed to make the transition to the new system, and so established a delayed effective date of November 1, 1987, for "new law" sentencing. *See* Pet.Stat.App. 13, 21. There is not a word of legislative history to suggest that in 1986 Congress *sub silentio* rejected the fruits of this process and decided instead to accelerate by one year the effective date of supervised release,[11] in such a way that numerous

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[11] The snatches of legislative history (remarks of Senator Dole) cited by both parties; Pet. Br. 39 n.25, Resp. Br. 9, 13; show at most that the leadership of Congress wished to enact the anti-drug bill before the Election Day recess. They do not reveal anything substantive about the content or meaning of the bill itself.

other provisions of the Act would be rendered self-contradictory and the supervised release provision itself would be left devoid of meaning. It is much more reasonable to infer that Congress decided at the last moment to conform the drug bill better to the impending process of sentencing reform and to have at least the ADAA's supervised release provisions go into effect only for offenses committed on or after November 1, 1987.

2. All of the Penalty Provisions of the 1986 Act Went into Effect on November 1, 1987.

The respondent's assertion "that Congress wanted all the penalty provisions in Section 1002 to go into effect at the same time" is not "[c]ontrary to petitioner's contention." Resp. Br. 16. In fact, we advance the same contention, only arguing for a November 1, 1987, common date, based on the relationship between ADAA § 1002 and sections 1007 and 1009 of the same Act. Pet. Br. 24-28. Respondent's attempt to argue against this construction by means of what amounts to "subsequent legislative history," *see* Resp. Br. 14; *Sullivan v. Finkelstein*, 496 U.S. ___, 110 L.Ed.2d 563, 575 n.8 (June 18, 1990), must avail it nothing. Moreover, it is simply untrue that this argument has been "rejected by every court that has considered it." Resp. Br. 12. To the contrary, *United States v. Preston*, 739 F.Supp. 294 (W.D. Va. 1990) (*see* Pet. Br. 27), adopted precisely this argument after full analysis.[12]

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[12] None of the court of appeals cases cited in Resp. Br. 12 n.2 considered the argument advanced in petitioner's opening brief. Those cases assert that the effective date of the ADAA's

(Continued on following page)

It is odd that respondent describes this argument, which follows a different and much more extended argument in support of our position, as being how our brief "begins." Resp. Br. 11. Instead, we began, as did the respondent, with a discussion of the axiom of construction, and do so again in this Reply. We then proceeded into a detailed analysis of the language of the Anti-Drug Abuse Act of 1986, revealing half a dozen or more ways that provisions of the Act are rendered contradictory or meaningless by the respondent's theory. Pet. Br. 14-24. Thus, it is equally odd to find the respondent asserting that the 1986 Act "nowhere indicates" a later effective date. *Id*. at 8; see also *id*. at 12 ("nothing in . . . the 1986 Act that suggests" later date). Those eleven pages of our brief discuss numerous such "indicat[ions]" in detail. The respondent attempts later in its brief to brush these off as "drafting errors" and "mismatched cross-references," Resp. Br. 25 n.12, because its theory of immediate effectiveness cannot explain them.

The respondent also suggests that Congress's use of express no-parole language in § 1002 and related sections of the 1986 Act shows that these provisions were intended to go into effect immediately, because parole was already set to be abolished as of November 1, 1987, by virtue of the Sentencing Reform Act. Resp. Br. 15 n.4.

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non-parolable and mandatory minimum penalty provisions was October 27, 1986, but most of them cite only the earlier cases on that list and none discusses the implications of ADAA §§ 1007 and 1009. In opposition to those cases, *see Hernandez Rivera v. United States*, 719 F.Supp. 65 (D.P.R. 1989).

This argument proves too much. The 1988 Anti-Drug Abuse Act amended 21 U.S.C. § 845a while leaving intact language barring parole during service of the mandatory minimum term which was at best equally "unnecessary . . . surplusage," as is the meaningless language left by Congress in *id*. § 845b after its 1988 amendment. Pub.L. 100-690, §§ 6458, 6459, 102 Stat. 4373. Indeed, the same surplusage remains to this day throughout §§ 841(b) and 960.

Accordingly, for the reasons set forth in our opening brief, the supervised release provisions of ADAA § 1002 did not become effective until November 1, 1987, because that was the effective date of the entire section.

3. A Silent Statute Is an Ambiguous Statute, as Is a Contradictory One; Thus, the Rule of Lenity Applies.

This Court has apparently never in its history had to resolve a question of when a statute became effective. The closest analogous precedent, however, is clearly *Bifulco v. United States*, 447 U.S. 381 (1980), as discussed throughout the petitioner's brief. Yet the respondent manages not even to mention the majority opinion in that case. Instead, it invokes uncontroversial but inapt phrases to deflect the petitioner's argument based on the rule of lenity. Nothing in the petitioner's brief could be construed as invoking the rule of lenity "at the beginning as an overriding consideration" nor as seeking to use the rule "to beget [an ambiguity]." Resp. Br. 26.

There is ambiguity here because § 1002 does not say when that amendment is to be deemed effective, at least as to its supervised release provisions. Moreover, inferring a

last-moment one year acceleration of the long-planned 1987 commencement of supervised release generates what the respondent admits are "many . . . anomalies," "incongruities,' and "statutory mismatches," Resp. Br. 20, 21, 25 n.12, which the respondent gamely defends as "not . . . absurd." *Id.* at 10. These "internal inconsistencies" must be "dealt with," not ignored. *United States v. Turkette*, 452 U.S. 576, 580 (1981). As demonstrated in our opening brief, these problems can be virtually eliminated by the construction of the statute advanced by the petitioner, under which all supervised release provisions became effective on November 1, 1987, which the respondent admits would be "more symmetrical." Resp. Br. at 22. The respondent's interpretation would borrow trouble for numerous future cases by carving the contradictions in stone. Resp. Br. at 25 n.12.

Certainly, § 1002 of the ADAA shows that Congress in 1986 reversed its determination of 1984 to eliminate special parole for higher volume drug offenders. The question, however, is whether it intended to do so immediately, even at the expense of upsetting the timetable for sentencing reform, including the innovation of supervised release, that was already well under way and scheduled for implementation in just a year, on November 1, 1987. The change back to extended supervision in § 841(b)(1)(A) cases was not a highlight of the 1986 bill, to put the matter mildly; it received not a mention in the legislative history. It was simply not an issue of importance to Congress. Violators in the petitioner's category, like those convicted under 21 U.S.C. § 846 of conspiracy or attempt as interpreted in *Bifulco*, were not subject to special parole after the 1984 amendments. To continue that situation for another year, while such offenders were

still subject to parole in conspiracy cases and mandatory release supervision on all counts, was not too high a price for Congress to pay for a smooth transition to supervised release, as had been long planned, under the regime of the Sentencing Reform Act.

Finally, the respondent seems to be trying to leave room in its argument for a suggestion that if supervised release cannot be imposed here, then somehow the Court should order restoration of the petitioner's special parole terms. Resp. Br. 18, 20-21, 26-27. Not only was that possibility excluded (at the respondent's suggestion) from the question on which certiorari was granted, it has no basis in any statutory language. When and how to "fix" statutory "gaps" or even "errors" is Congress' business, not the courts'. This Court emphatically and properly recognized that principle in *Bifulco* and must apply it again here.

Assuming his sentences are not vacated entirely for the reasons discussed under Point 2 above, petitioner Gozlon will be under ordinary parole supervision for about ten years when released from imprisonment under his 20-year sentence on Count 1; he will also be treated "as if on parole" for about the first five of those years when mandatorily released from confinement on Counts 2 and 3. For all the many reasons discussed in our brief on the merits and in this reply, however, he is not additionally subject to either special parole or supervised release.

CONCLUSION

For all of these reasons, and for the additional reasons discussed in the petitioner's opening brief, terms of supervised release may not be imposed as part of the sentence in this case, because the law creating that penalty was not yet effective at the time of commission of the offenses. The judgment of the United States Court of Appeals for the Third Circuit should be affirmed insofar as it vacated the special parole terms imposed on resentencing by the district court, but reversed to the extent that it remanded for imposition of terms of supervised release.

Respectfully submitted,

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